Military Justice Review Group

Report of the Military Justice Review Group

Part I: UCMJ Recommendations

December 22, 2015

REPORT OF THE MILITARY JUSTICE REVIEW GROUP

PART I: UCMJ RECOMMENDATIONS

DEPARTMENT OF DEFENSE
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December 22, 2015

Robert S. Taylor
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1600 Defense Pentagon
Washington, DC 20301-1600

Dear Mr. Taylor,

On behalf of the Military Justice Review Group (MJRG), I enclose Part I of our report: UCMJ Recommendations. Thank you for the superb support provided by you and your staff during this project.

Sincerely,

Andrew S. Effron

Enclosure:
As stated

Overview

The Uniform Code of Military Justice (UCMJ) provides the statutory framework for the military justice system. In this Report, the Military Justice Review Group (MJRG) analyzes each UCMJ article, including its historical background, current practice, and comparison to federal civilian law. The Report proposes substantive additions to the UCMJ through 37 new articles, substantive statutory amendments to 68 articles, and includes consolidated draft legislation incorporating all proposed changes. These proposed changes would enhance the purpose of military law as stated in the Preamble to the Manual for Courts-Martial (MCM): "[T]o promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."

Establishing the Military Justice Review Group

This comprehensive review of the UCMJ and MCM resulted from a request to the Secretary of Defense by DoD's senior uniformed leadership.

- In August 2013, the then-Chairman of the Joint Chiefs of Staff, General Martin Dempsey, and the other members of the Joint Chiefs recommended that then-Secretary of Defense Chuck Hagel order a holistic review of the UCMJ in order to ensure that it effectively and efficiently achieves justice consistent with due process and good order and discipline.

- On October 18, 2013, Secretary Hagel directed the DoD General Counsel to conduct a comprehensive review of the UCMJ and the military justice system with support from military justice experts provided by the military services. Secretary Hagel directed the review to include an analysis of not only the UCMJ, but also its implementation through the Manual for Courts-Martial and service regulations.

- The Secretary also directed the review to consider the report and recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel), a twelve-month independent review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault and related offenses in the military, including the role of the commander in the administration of military justice.

Guiding Principles

The DoD General Counsel established the MJRG with direction to take into account five principles during its review:

- Use the current UCMJ as a point of departure for baseline reassessment.

- Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial

of criminal cases in the United States district courts should be incorporated into military justice practice.

- To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.
- Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.
- Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.

Major Legislative Proposals

This Report contains the MJRG's completed review of the UCMJ. Proposals for amendments to the UCMJ generally fall into seven categories. This Report's major proposals would:

- ***Strengthen the Structure of the Military Justice System by—***
  - Requiring issuance of guidance on the disposition of criminal cases similar to the U.S. Attorneys Manual, tailored to military needs.
  - Mandating additional training for commanders and convening authorities focused on the proper exercise of UCMJ authority.
  - Establishing a military judge-alone special court-martial as an additional option for disposition, similar to the judge-alone forum in civilian proceedings, with confinement limited to a maximum of six months and no punitive discharge.
  - Establishing selection criteria for military judges, mandating tour lengths, and requiring appointment of a Chief Trial Judge in each armed force.
  - Creating authority for military judges to handle specified legal issues that arise before formal referral of a case to court-martial that would otherwise await a ruling until after referral to court-martial.
  - Establishing a military magistrates program as an option for the services, with magistrates authorized to preside over specified pre-referral matters upon designation by a military judge, and to preside with the consent of the parties in the proposed judge-alone special court-martial.
- ***Enhance Fairness and Efficiency in Pretrial and Trial Procedures by—***
  - Continuing to enhance victims' rights by:
    - Creating the opportunity for victim input on disposition decisions at the preliminary hearing stage.
    - Providing for public access to court documents and pleadings.
    - Treating victims consistently with regard to defense counsel interviews and access to records of trial.
  - Expanding authority to obtain documents during investigations through subpoenas and other process.

  - Enhancing the utility of the preliminary hearing for the staff judge advocate and convening authority and providing an opportunity for parties and victims to submit relevant information on the appropriate disposition of offenses.
  - Replacing the current variable composition and voting percentages for court-martial panels (military juries) with a requirement for a standardized number of panel members and a consistent voting percentage.
  - Requiring, to the greatest extent practicable, at least one defense counsel be learned in the law applicable to capital cases, as in federal civilian courts and military commissions.

- ***Reform Sentencing, Guilty Pleas, and Plea Agreements by—***
  - Ensuring that each offense receives separate consideration for purposes of sentencing to confinement.
  - Replacing the current sentencing standard (which relies on maximum punishments with minimal criteria in adjudging a sentence below the maximum) with a system of judicial discretion guided by parameters and criteria.
  - Improving military plea agreements by allowing negotiated ranges of punishments and adjudged sentences within the range.
  - Continuing to permit appeals of sentences by servicemembers, and establishing government appeals of sentences in circumstances similar to federal civilian practice.
  - Providing for the effective implementation of these reforms by establishing sentencing by military judges in all non-capital trials.

- ***Streamline the Post-Trial Process by—***
  - Eliminating redundant post-trial paperwork and requiring an entry of judgment by the military judge similar to federal civilian practice to mark the completion of a special or general court-martial.
  - Establishing restricted authority to suspend sentences in cases in which the military judge recommends a specific form of suspension and the convening authority approves a suspension within the military judge's recommendation.

- ***Modernize Military Appellate Practice by—***
  - Permitting the government to file interlocutory appeals in general and special courts-martial regardless of whether a punitive discharge could be adjudged.
  - Transforming the automatic appeal of cases to the service Courts of Criminal Appeals into an appeal of right in which the accused, upon advice of appellate defense counsel, would determine whether to file an appeal.
  - Expanding direct review jurisdiction of the Courts of Criminal Appeals primarily with respect to cases in which an accused is sentenced to confinement for more than six months.
  - Providing servicemembers, like their civilian counterparts, with the opportunity to obtain judicial review in all cases.

  - Focusing the appeal on issues raised by the parties, with the opportunity for the Courts of Criminal Appeals to review for plain error.
  - Establishing harmless error standards of review for guilty pleas similar to those applied by the federal civilian courts of appeal.
  - Providing for review of issues identified by the accused regarding factual sufficiency when the appellant makes a sufficient showing to justify relief.
  - Permitting the government to appeal a sentence under conditions similar to those applied by the federal civilian courts of appeal.
  - Continuing to require automatic review of capital cases and requiring, to the greatest extent practicable, at least one appellate defense counsel be learned in the law applicable to capital cases.
- ***Increase Transparency and Independent Review of the Military Justice System by—***
  - Creating a statute requiring uniform public access to courts-martial documents and pleadings similar to that available in federal civilian courts.
  - Establishing an independent blue ribbon panel of experts to conduct periodic reviews of the UCMJ.
- ***Improve the Functionality of Punitive Articles and Proscribe Additional Acts by—***
  - Restructuring the punitive articles of the UCMJ, which proscribe criminal acts.
  - Establishing specific statutory punitive articles to cover many forms of misconduct now addressed by Executive Order in the General Article.
  - Authorizing the President to designate lesser included offenses under legislative criteria.
  - Aligning the definition of "sexual acts" in Article 120 with federal civilian law.
  - Revising the prohibition against stalking (Article 130) to include cyberstalking and threats to intimate partners.
  - Amending the statute of limitations for child-abuse offenses, fraudulent enlistment, and to extend the period when DNA testing implicates an identified person.
  - Creating new enumerated offenses, including:
    - Article 93a: Prohibited activities with military recruit or trainee by person in position of special trust
    - Article 121a: Fraudulent use of credit and debit cards
    - Article 123: Offenses concerning Government computers
    - Article 132: Retaliation

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Executive Summary

Introduction

The Uniform Code of Military Justice (UCMJ) provides the statutory framework for the military justice system. In this Report, the Military Justice Review Group (MJRG) provides individual analysis of every article of the UCMJ, including summaries of the current statutes, historical background, current practice, and comparisons to applicable rules and procedures in federal civilian practice. The Report proposes substantive additions to the UCMJ through 37 new articles and substantive statutory amendments to 68 articles. The Report includes consolidated draft legislation incorporating all proposed changes.

This summary briefly describes the background of the MJRG and highlights the primary recommendations in the Report.[1]

Establishing the MJRG and its Guiding Principles

This comprehensive review of the military justice system resulted from a request by the Department of Defense's senior uniformed leadership to the Secretary of Defense. In August 2013, the then-Chairman of the Joint Chiefs of Staff, General Martin Dempsey, and the other members of the Joint Chiefs recommended to then-Secretary of Defense Chuck Hagel "a comprehensive and holistic review" of the UCMJ and the military justice system to ensure that the system "most effectively and efficiently does justice consistent with due process and good order and discipline."[2] The Joint Chiefs concluded that a comprehensive review of the UCMJ was appropriate in view of the many social developments and major changes in the armed forces since the last comprehensive review, which occurred in the 1980s.

On October 18, 2013, Secretary Hagel directed the General Counsel of the Department of Defense to conduct a comprehensive review of the UCMJ and the military justice system, including the MCM and service regulations, with support from military justice experts provided by the military Services.[3] The Secretary's direction included a requirement to consider the report and recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel).[4]

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[1] Section B of the Report contains an Article-by-Article Index of UCMJ Recommendations, followed by a detailed analysis of each provision of the UCMJ, including recommended amendments. Section C of the Report contains consolidated draft legislation that includes all proposed amendments to the UCMJ.

[2] U.S. Dep't of Def., Memorandum from the Chairman of the Joint Chiefs of Staff on Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice (Aug. 5, 2013). The Chairman's memorandum is attached as Appendix A to this Report.

[3] U.S. Dep't of Def., Memorandum from Secretary of Defense on Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013). Secretary Hagel's memorandum is attached as Appendix B to this Report.

[4] *Id.* The Response Systems Panel was established by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013) [hereinafter NDAA FY 2013]. The Response Systems

The DoD General Counsel established the MJRG to carry out the comprehensive review, utilizing military justice experts detailed by the Services.[5] The General Counsel appointed Andrew S. Effron, former Chief Judge of the United States Court of Appeals for the Armed Forces, to serve as the Director of the MJRG.[6]

The General Counsel's Terms of Reference established five guiding principles for the MJRG to apply during its review:

- Use the current UCMJ as a point of departure for baseline reassessment.
- Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.
- To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.
- Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.
- Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.[7]

The DoD General Counsel also directed the MJRG to consult with general and flag officers with experience as general court-martial convening authorities—senior commanders with authority to direct that cases be tried by court-martial. The Legal Counsel to the Chairman of the Joint Chiefs of Staff was tasked with assisting in identifying a suitable group of

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Panel conducted a twelve-month independent review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault and related offenses in the military, including the role of the commander in the administration of military justice. *See* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT], *available at* http://responsesystemspanel.whs.mil. The Response Systems Panel ultimately made 132 recommendations, which the Department of Defense is in the process of implementing. *See* U.S. Dep't of Def., Memorandum from the Secretary of Defense on Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Dec. 15, 2014), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/05_DoDResponse_RSPRecommendations_20141215.pdf.

[5] In addition to detailed military personnel, the MJRG staff includes civilian personnel with expertise in military and criminal law, as well as experienced legislative counsel. The MJRG also benefits from the assistance of personnel made available on a periodic basis by the DoD General Counsel and the Department of Justice.

[6] *See* Appendix D to this Report for a full list of the members of the MJRG and its Advisors.

[7] Terms of Reference for the Military Justice Review Committee (Jan. 24, 2014) and Addendum (Mar. 12, 2014) [hereinafter Terms of Reference and Addendum, respectively]. Both the Terms of Reference and the Addendum are attached as Appendix C to this Report.

officers for this purpose. Finally, the DoD General Counsel required the Director to coordinate any proposed amendments, at his discretion, on an ongoing basis with the DoD Deputy General Counsel (Personnel & Health Policy), The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff.[8]

The General Counsel designated two distinguished experts in the law—the Honorable David Sentelle, former Chief Judge for the United States Court of Appeals for the District of Columbia Circuit; and the Honorable Judith Miller, former DoD General Counsel—to serve as Senior Advisors to the MJRG. The DoD General Counsel also requested that the Department of Justice designate an expert criminal litigator to serve as an advisor to the MJRG. Mr. Jonathan Wroblewski, Director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice (DoJ), serves as the DoJ's Advisor to the MJRG. Mr. John Sparks and Mr. Clark Price have served as advisors to the MJRG from the United States Court of Appeals for the Armed Forces.

The DoD Office of General Counsel facilitated the opportunity for public input to the MJRG by establishing a website that included an invitation to submit recommendations.[9] The Office of General Counsel also wrote to over 400 organizations, including bar associations, law schools, victims' advocacy groups, and other public interest organizations, advising them of the opportunity for input. The MJRG received numerous thoughtful public comments which it considered during the review process.

The Secretary of Defense established a very tight time frame for completion of the comprehensive review—one year for a legislative report on the UCMJ, and a report on implementing rules six months later.[10] Based upon this guidance and direction from the DoD General Counsel, the MJRG submitted its initial report on the UCMJ to the General Counsel on March 25, 2015. Following a period of internal review within the Department of Defense, the MJRG submitted a revised UCMJ report on September 2, 2015. The Department approved the legislative proposals in the revised report as an official Department of Defense proposal, and submitted the proposals to the Office of Management and Budget for interagency review. After considering comments provided during the interagency review, the MJRG prepared this final report, which includes the legislation that has been submitted to Congress as an official administration proposal.

Based upon guidance from the DoD General Counsel, the MJRG has prepared a separate report on implementing rules, focusing primarily on the Manual for Courts-Martial

[8] Terms of Reference, *supra* note 7, at 4.

[9] The MJRG's website is located at http://www.dod.mil/dodgc/mjrg.html.

[10] The MJRG's separate review of implementing rules is described in Section A, Part 2 of this Report. Many potential areas for MCM proposals are identified in this Report's discussions of the UCMJ.

(MCM).[11] The MJRG's report on the MCM, which was submitted to the DoD General Counsel on September 21, 2015, currently is under review within the Department of Defense.

Further information regarding the scope and methodology of the MJRG is found in Part A of this Report.

Purpose of Military Law

The purpose of military law is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[12] These three major recurring themes—justice, discipline, and efficiency—are set forth in complementary clauses of the Preamble to the Manual for Courts-Martial and are woven throughout the structure and provisions of the UCMJ and the Manual. Since its inception in 1775, military law in the United States has evolved to recognize that all three components are essential to ensure that our national security is protected and strengthened by an effective, highly disciplined military force.

The current structure and practice of the UCMJ embodies a single overarching principle based on more than 225 years of experience: a system of military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public. "Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. . . . It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline."[13] This Report's proposals are made with full recognition that the necessity for justice and the requirement for discipline are inseparable.[14]

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[11] The President implements the UCMJ and prescribes rules for pretrial, trial, and post-trial procedure by executive order in the MCM. Based upon direction from the DoD General Counsel, the MJRG's report on the MCM includes recommendations for rules that would be used to implement the legislative proposals from the MJRG, subject to enactment. In that context, the recommendations in the MJRG's MCM report take the form of a discussion draft that provides a foundation for further consideration during internal DoD and interagency review.

[12] MCM, Part I, ¶3; *see also* Parker v. Levy, 417 U.S. 733, 763-64 (1974) (Blackmun, J., concurring) ("[C]ommanders who are arbitrary with their charges will not produce the efficient and effective military organization this country needs and demands for its defense.").

[13] AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11 (Jan. 18, 1960) [hereinafter POWELL REPORT], *available at* http://www/loc.gov/rr/frd/Military_Law/pdf/Powell_report/pdf.

[14] *See*, *e.g.*, POWELL REPORT, *supra* note 11, at 11-12 ("In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable. . . ."); United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953) ("It was generally recognized [by Congress] that military justice and military discipline were essentially interwoven. . . . [C]onfronted with the necessity of maintaining a delicate balance between justice and

The need to promote discipline through an instrument of justice requires a court-martial system that differs in important respects from civilian criminal justice systems. As the Supreme Court has stated, the military remains a "specialized society separate from civilian society . . . [because] it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[15] This separateness of purpose and mission has shaped the values and traditions that are embodied in the UCMJ, as reflected in the following unique characteristics that distinguish courts-martial from criminal trials in the civilian courts.

Unique Military Offenses. The offenses proscribed by the UCMJ are "military offenses," even when similar offenses also exist at common law. This is because crimes committed by military members, irrespective of substantially similar civilian counterparts, have the potential to seriously damage unit cohesion by destroying the bonds of trust critical to successful mission accomplishment. There are also crimes under the UCMJ that consist of unique military offenses—including desertion, disrespect, disobedience, malingering, misbehavior before the enemy, and others. These offenses are specifically proscribed in the military context because of their deleterious impact on morale and mission accomplishment.

In addition, Article 134, the General Article, proscribes conduct that is prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. Under this article and others, members of the armed forces can face prosecution for acts which are not regarded as criminal in civilian jurisdictions. For example, activity that might be protected under the First Amendment to the Constitution if carried out by a civilian can lead to criminal punishment for a member of the armed forces. This is because the unique needs of military service require constitutional considerations to be applied differently to those who serve in the military.[16] "In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, [Article] 133 imposes such a sanction on a commissioned officer."[17]

Unique Military Procedures. The court-martial system has unique procedures developed for those circumstances where civilian criminal procedures are impractical or unworkable in a military setting. The procedures often have as their origin the need for a system that is

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discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws."); Article 30(b), UCMJ ("Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition would be made thereof *in the interest of justice and discipline*.") (emphasis added).

[15] *Parker*, 417 U.S. at 743 (internal quotation and citation omitted).

[16] *See Parker*, 417 U.S. at 758 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[17] *Parker*, 417 U.S. at 739.

simultaneously efficient and capable of operating in a wide variety of settings—including forward-deployed areas of armed conflict—while also remaining fair and just given the highly hierarchical structure of the military.

Sometimes these procedures are more favorable to members of the armed forces than analogous procedures in civilian practice. For example, rights advisement warnings under Article 31(b)—similar to those required in the civilian setting by *Miranda v. Arizona*[18]—are required whenever a servicemember is suspected of an offense and questioned, regardless of whether he or she is in custody. This extra protection for military members suspected of crimes is rooted in the recognition of the inherently custodial nature of interrogation within the military setting. Additionally, in the military, the assistance of counsel is provided throughout the court-martial and appellate process, regardless of the member's rank or ability to pay. With respect to court-martial procedure, the military employs a robust and open discovery process designed to minimize gamesmanship, increase efficiency in the pretrial and trial processes, and ensure that a servicemember's rights during these processes are protected.

Sometimes the procedures employed in the court-martial process are less favorable to servicemembers than similar procedures in civilian practice. For example, in the military, confinement before trial is permitted under broader circumstances than in civilian practice, and with no potential for bail. Also, court-martial panels (military juries) can be composed of fewer than twelve members and do not require unanimous verdicts except to proceed to capital sentencing in a case in which the death penalty is an authorized sentence. The Supreme Court traditionally defers to the balance struck by Congress in these matters. "[I]n determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8."[19]

Unique Military Punishments. In addition to confinement and fines, servicemembers found guilty of committing criminal offenses under the UCMJ face possible punitive separation (bad-conduct or dishonorable discharges for enlisted personnel; dismissal for officers) as well as reductions in their rank and loss of pay. These punishments not only remove convicted military members from the armed forces, they may also deprive them of vested retirement pay and veterans benefits otherwise earned during periods of honorable service.

Partnership of Staff Judge Advocates and Convening Authorities. The partnership of convening authorities—senior commanders authorized to convene courts-martial—and their primary legal advisors, staff judge advocates, is a distinct feature of the military justice system. Staff judge advocates provide critical advice to general court-martial convening authorities. A convening authority may not refer charges to trial by general court-martial in the absence of legal analysis and the staff judge advocate's determination that: the charge alleges an offense under the UCMJ; there is jurisdiction over the offense

[18] Miranda v. Arizona, 384 U.S. 436 (1966).

[19] Middendorf v. Henry, 425 U.S. 57, 67 (1976).

and the accused; and the charge is warranted by the evidence contained in the preliminary hearing report.[20]

Due in part to the unique roles of the staff judge advocate and convening authority in the military justice system, as well as the authority and responsibilities of commanders throughout the military organization, the UCMJ includes an express statutory provision addressing unlawful command influence. Under Article 37, interference with court-martial proceedings by convening authorities and all others subject to the Code is strictly prohibited. Such a prohibition has no direct parallel in federal civilian practice, but is essential in ensuring a just system that maintains the confidence of both servicemembers and the public. For example, "by insulating military judges from the effects of command influence, [the UCMJ and corresponding regulations] sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause" requirement for "a fair trial in a fair tribunal."[21] The prohibition against unlawful command influence was a major driving factor behind the enactment of the UCMJ. It remains essential to ensure fairness and justice in the armed forces, which require a hierarchical command structure in order to prevail in the harsh and unforgiving conditions of military combat.

Deployability. In the military, there is a unique need to conduct trials in deployed environments during ongoing combat operations around the world, as well as in other nations where American servicemembers are stationed. Courts-martial are routinely conducted in nations with which the United States has Status of Forces Agreements; these agreements establish priority of criminal jurisdiction over offenses committed by servicemembers between the host nation's law and the UCMJ. In addition, numerous courts-martial have been conducted during combat deployments, including throughout the deployments that have taken place in Iraq and Afghanistan since the September 11, 2001 attacks.

Consideration of Criminal Law Practices in Civilian Courts. Congress enacted the UCMJ in 1950 following widespread dissatisfaction with the operation of courts-martial and their fairness to the accused during World War II. Congress addressed this dissatisfaction in the UCMJ, in part, by prohibiting unlawful command influence and creating an appellate court composed of civilians, the court now designated as the United States Court of Appeals for the Armed Forces. Since then, the UCMJ has continually evolved in an effort to achieve justice, discipline, and efficiency and fine tune the balance between these complementary goals. The result is "a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history . . . ."[22]

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[20] *See* Articles 30 and 34, UCMJ. For additional information and a recent assessment of the role of the commander in the military justice system *see* RESPONSE SYSTEMS PANEL REPORT, *supra* note 4, at 22-25; 73-74; 125-132; 167-171.

[21] Weiss v. United States, 510 U.S. 163, 179 (1994).

[22] *Weiss*, 510 U.S. at 194 (Ginsburg, J., concurring).

Military law has incorporated practices and procedures of federal civilian law where practicable and not contrary to or inconsistent with the requirements of the armed forces. It also has counterbalanced the limitation of rights available to servicemembers with procedures designed to ensure protection of those rights that are provided under military law.[23] Since its enactment in 1950, significant changes to the UCMJ include the establishment of the military judiciary in 1968 with enhanced powers and the requirement for qualified defense counsel in most instances; the adoption of the Military Rules of Evidence in 1980; simplification of the post-trial process and enhancement of appellate review in 1983; adoption of a rule-based MCM in 1984 to replace the uncertainties generated by the prior treatise format; and a variety of clarifying amendments in subsequent years.

As a result of these and other changes, the modes of presentation and the rules of evidence that currently apply during trials by courts-martial are nearly identical to those in federal civilian courts. Other procedures—such as how cases are sent to trial and how panel members are selected; the number of members required on panels; the percentage of votes required for a finding of guilty; sentencing proceedings; and numerous other procedures—continue to retain military-specific components.

This Report examines many of the distinctions that remain between military practice under the UCMJ and federal and state civilian practice. The proposals recommend aligning certain procedures with federal civilian practice in instances where they will enhance fairness and efficiency and where the rationale for military-specific practices has dissipated. For example, robust military judiciary and defense counsel organizations are firmly rooted in a system largely constructed prior to their development. These and other systemic changes reflect the growth and maturation of the military justice system since Congress enacted the UCMJ.

This Report's proposals recommend retaining military-specific practices where the comparable civilian practice would be incompatible with the military's purpose, function, and mission, or would not further the goals of justice, discipline, and efficiency in the military context. Maintaining distinct military practices and procedures—where appropriate—remains vital to ensuring justice within a hierarchical military organization that must operate effectively both at home and abroad, during times of conflict and times of peace.

Contemporary Context

Recent Legislation. Recognizing the inseparable link between justice and discipline, changes made to the UCMJ since 1950 have served to enhance the rights of servicemembers, to provide effective disciplinary tools for military commanders, and to increase the efficiency of court-martial and appellate procedures.[24] In recent years,

[23] *See Weiss*, 510 U.S. at 174 ("By enacting the [UCMJ] in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system.").

[24] For a detailed narrative of the evolution of military justice, see Section A of this Report.

legislative changes focused primarily, but not exclusively, on concern over the manner in which the military justice system addresses sexual assault allegations, and the treatment of sexual assault victims within the system. These targeted changes reflect concern that neither servicemembers nor the public will have confidence in a system of military law that does not—or does not appear to—protect the dignity and rights of victims as well as the rights of the accused.

Recent changes represent significant modifications to court-martial practice. In general, the changes enhanced victims' rights and participation throughout the military justice process while limiting the exercise of convening authorities' pretrial and post-trial discretion. These changes also revised a number of practices before, during, and after trial related to the interests of an accused in the context of a military organization.

In the National Defense Authorization Acts for Fiscal Years 2014 and 2015, Congress enacted substantial amendments to 15 articles of the UCMJ, along with additional statutory provisions outside the UCMJ, that have directly impacted military justice practice.[25] A recent executive order contains numerous provisions that implement these statutory provisions throughout the Manual for Courts-Martial.[26]

Major changes in the recent legislation include:

- Codifying victims' rights in Article 6b and incorporating into the statute many of the rights available to victims in federal civilian courts.
- Providing Special Victims' Counsel to alleged victims of sex-related offenses who are authorized to receive legal assistance for legal consultation and representation in connection with the reporting, military investigation, and military prosecution of sex-related offenses.
- Transforming the broad pretrial investigation of offenses under Article 32 into a more focused preliminary hearing, and providing that victims may not be compelled to testify at the hearing.
- Curtailing the convening authority's previously unrestricted post-trial discretion to take action favorable to an accused on the findings or sentence of a court-martial, permitting modification only in narrowly defined circumstances.
- Limiting the availability of depositions to situations in which exceptional circumstances and the interests of justice require the preservation of prospective witness testimony for use at preliminary hearings or trial.

[25] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter NDAA FY 2014]; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014) [hereinafter NDAA FY 2015]. The MJRG's separate review of implementing rules is described in Section A, Part 2, of this Report.

[26] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

- Creating oversight mechanisms in circumstances where the convening authority declines to refer certain alleged sexual assaults to trial, and limiting the forum for trial of those offenses to general court-martial.

- Directing the President to amend the Military Rules of Evidence to enhance witnesses' psychotherapist-patient privilege and limit the accused's right to present evidence of his or her good military character to raise reasonable doubt as to guilt.

- Amending the equal opportunity of the trial counsel, defense counsel, and the court-martial to obtain witnesses and other evidence by limiting the circumstances under which counsel for the accused may interview alleged sexual assault victims.

- Requiring that the sentence for certain sexual assault offenses include, at a minimum, a dishonorable discharge or dismissal.

Further changes were enacted in the National Defense Authorization Act for Fiscal Year 2016.[27]

Federal Advisory Committees. Congress also directed the Secretary of Defense to establish several federal advisory committees to examine military law and practices with regard to sexual assault allegations. All of these efforts reflect significant congressional and public interest in the military justice system.

- The Response Systems Panel was established in 2013 to conduct a twelve-month review of the effectiveness of the systems used to investigate, prosecute, and adjudicate sexual assault offenses, including the role of the commander in the military justice system. The Response Systems Panel issued its report in June 2014,

[27] *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015) [hereinafter NDAA FY 2016]. The statute includes: enforcement of certain crime victim rights by the Court of Criminal Appeals (sec. 531); Department of Defense civilian employee access to Special Victims' Counsel (SVC) (sec. 532); authority for SVCs to provide legal consultation and assistance in connection with various government proceedings (sec. 533); timely notification of victims of sex-related offenses of the availability of SVC assistance (sec. 534); additional improvements to the SVC program (sec. 535); enhancement of confidentiality of restricted reporting in sexual assault cases (sec. 536); modification of the deadline for establishment of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (sec. 537); improved Department of Defense prevention and response to sexual assaults in which the victim is a male member of the armed forces (sec. 538); preventing retaliation against members of the armed forces who report or intervene on behalf of the victim of an alleged sex-related offense (sec. 539); sexual assault prevention and response training for administrators and for Senior ROTC instructors (sec. 540); retention of case notes in investigations of sex-related offenses (sec. 541); report on prevention and response to sexual assault in the Army National Guard and Army Reserve (sec. 542); improved implementation of UCMJ changes (sec. 543); modification of RCM 104 to establish certain prohibitions on evaluations of Special Victims Counsel (sec. 544); modification of MRE 304 relating to the corroboration of a confession or admission (sec. 545). *See* 161 Cong. Rec. H7747-H8123 (daily ed. Nov. 5, 2015) (bill text and joint explanatory statement). *See also* H.R. REP. NO. 114-102 (2015), at 144-47; S. REP. NO. 114-49 (2015), at 120-23.

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including 132 recommendations, many of which directly impact practices under the UCMJ.[28]

- The Judicial Proceedings Panel followed the Response Systems Panel.[29] The Judicial Proceedings Panel is reviewing the operation of the court-martial process with respect to sexual assault offenses, and will issue periodic reports through 2017. The Judicial Proceedings Panel issued its Initial Report on February 4, 2015.[30]

- Congress recently directed the creation of an additional advisory committee to conduct an in-depth study of selected court-martial cases involving sexual assault. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces will begin its work in 2016.[31]

- In addition to these congressionally mandated review groups, the Secretary of Defense independently established the Defense Legal Policy Board, a discretionary federal advisory committee, in 2012. The Board issued its report on the reporting and investigation of cases where servicemembers were alleged to have caused the death, injury, or abuse of non-combatants in Iraq or Afghanistan in June 2013.[32] The report of the Board recommended, among other things, reforms to the military justice system.

Summary of Recommendations – Major Legislative Proposals

The following are the MJRG's major proposals for changes to the UCMJ. Unless otherwise noted, the proposals are predicated on a one-year transition period for implementation—that is, a one-year period between the date of enactment of any legislation and the date on which the new legislation would come into effect. These proposals fall into seven categories:

- Strengthening the Structure of the Military Justice System
- Enhancing Fairness and Efficiency in Pretrial and Trial Procedures
- Reforming Sentencing, Guilty Pleas, and Plea Agreements

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[28] *See* note 4, *supra*, for more information about the Response Systems Panel.

[29] The full name of the Judicial Proceedings Panel is "The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel." NDAA FY 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013).

[30] *See* INITIAL REPORT OF THE JUDICIAL PROCEEDINGS PANEL (Feb. 2015) [hereinafter JUDICIAL PROCEEDINGS PANEL INITIAL REPORT], *available at* http://jpp.whs.mil/.

[31] The NDAA FY 2016 requires establishment of this additional advisory committee within 90 days after enactment of the statute. *See* note 27, *supra.*

[32] DEFENSE LEGAL POLICY BOARD REPORT ON MILITARY JUSTICE IN COMBAT ZONES (JUNE 2013), *available at* http://www.facadatabase.gov/committee/historyreportdocuments.aspx?flr=14657&cid=2446&fy=2013.

- Streamlining the Post-Trial Process
- Modernizing Military Appellate Practice
- Increasing Transparency and Facilitating Independent, Ongoing Review of the Military Justice System
- Improving the Functionality of the Punitive Articles and Proscribing Additional Criminal Acts

Strengthening the Structure of the Military Justice System

The Convening Authority-Staff Judge Advocate Partnership. This Report proposes strengthening the partnership between the convening authority and the staff judge advocate. The proposals in the Report will enhance the scope and quality of information available to the convening authority and staff judge advocate in their evaluation of the full range of disposition options.

The Exercise of Disposition Discretion by Convening Authorities. Military commanders are responsible for instilling and maintaining the level of discipline necessary to ensure accomplishment of the military mission. The issue of whether that responsibility should continue to include the authority to refer cases to courts-martial, or whether that authority should be vested in judge advocates, has been the subject of considerable debate, as reflected in the report of the Response Systems Panel, a blue-ribbon advisory committee composed of distinguished non-governmental experts in civilian practice as well as military law.[33] Congress expressly directed the Response Systems Panel to assess the impact of removing disposition authority from the chain of command, focusing on sexual assault cases.[34] The Panel's report, which recommended retention of the commander's role in exercising disposition discretion, includes thoughtful views on both sides of the issue.[35] In view of the extensive testimony and evidence so recently gathered and considered by the congressionally-established Response Systems Panel, the MJRG has focused its efforts on measures to improve the current process, rather than on revisiting the underlying fundamental policy so soon after the Response Systems Panel completed its thorough and careful treatment of the issue.

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[33] *See* RESPONSE SYSTEMS PANEL REPORT, *supra* note 4, at 6-7, 22-25 (Recommendations 36-43), and 167-71.

[34] NDAA FY 2014 at § 1731(a)(1)(A) (directing the Response Systems Panel to assess "the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under . . . the Uniform Code of Military Justice . . . would have on overall reporting and prosecution of sexual assault cases."). *See also* NDAA FY 2013 at § 576(d)(1)(F-G) (directing the Response Systems Panel to assess "the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault . . . [and] the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and in the investigation, prosecution, and adjudication of adult sexual assault crimes.").

[35] RESPONSE SYSTEMS PANEL REPORT, *supra* note 4, at 6-7, 22-23 (Recommendations 36-37), 167-71, and 173-76 (Additional Views of Response Systems Panel Members Dean Elizabeth L. Hillman and Mr. Harvey Bryant).

In that regard, the proposals in this Report endeavor to enhance decision-making in the context of the convening authority-staff judge advocate relationship.

- *Focused commander and convening authority training*. First, this Report proposes to amend Article 137, which currently requires that all enlisted members receive training on the UCMJ, to also extend this requirement to cover officers, and to require periodic training for all those who exercise responsibility for the imposition of nonjudicial punishment or who convene courts-martial. Although the services currently incorporate military justice training into a variety of continuing professional education programs for both officers and non-commissioned officers, this proposal would establish a statutory requirement for focused training on the exercise of authority under the UCMJ. Part II of the Report will address the importance of focusing training and operational guidance that considers both the restrictions on unlawful command influence and the authority of commanders and senior officials to instill discipline through the exercise of lawful command emphasis.

- *Disposition considerations*. Second, this Report proposes to clarify the distinction between the minimum legal requirements for referral of a case to trial by court-martial under Article 34 (Advice of staff judge advocate and reference for trial) and the separate, prudential issues involving the exercise of disposition discretion by military commanders and convening authorities. This includes a proposal to establish Article 33 (Disposition guidance), which would require the President to direct the Secretary of Defense, in consultation with the Secretary of Homeland Security, to issue non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates and judge advocates should take into account when exercising their duties with respect to disposition of charges in the interest of justice and discipline. These considerations would take into account the guidance in the Principles of Federal Prosecution in the United States Attorneys Manual, with appropriate modifications to reflect the unique purposes and aspects of military law. This non-binding guidance, a proposed draft of which will be offered in Part II of this Report, would provide a functional decision-making framework for convening authorities, commanders, staff judge advocates and judge advocates to assess the full range of disposition options for alleged offenses under the Code, recognizing that the disposition decision encompasses many issues beyond the legal and factual sufficiency of a particular case.

- *Staff Judge Advocate/Legal Advisor's Advice*. The staff judge advocate's pretrial advice will still be required prior to referring a case to general court-martial, in accordance with Article 34. To enhance the exercise of referral discretion for special courts-martial, this Report's proposed amendments to Article 34 also would require pre-referral judge advocate consultation in all special courts-martial. Part II of the Report will focus on the rules implementing Article 34, with particular attention to the content of the staff judge advocate's advice and the responsibility to convey any victim's input in the referral decision. Part II also will address the content of the staff judge advocate's advice in cases where the staff judge advocate disagrees with

the findings of the preliminary hearing officer with respect to probable cause, the form of the charges, or jurisdiction.

Court-Martial Options. The military justice system has four primary components: non-judicial punishment, summary courts-martial, special courts-martial, and general courts-martial. This Report proposes including an additional option for special courts-martial, through amendments to Articles 16 (Courts-martial classified) and 19 (Jurisdiction of special courts-martial). Similar to civilian practice, the proposed option would authorize non-jury trials for minor offenses. This option would provide an alternative means of addressing minor offenses that may warrant a degree of punishment greater than authorized for a summary court-martial but would not warrant a punitive discharge or confinement for more than six months (particularly during contingency operations or when a rapid and large build-up of forces is underway). This alternative would consist of a judge-alone proceeding for findings and sentence, with a maximum confinement of six months and no punitive discharge authorized. The judge-alone special court-martial would be an option for consideration by the convening authority, not a matter for election by the accused, similar to civilian practice authorizing non-jury trials for petty offenses when the maximum punishment includes confinement for no more than six months. The accused in such a proceeding, and in all special courts-martial, would have increased access to appellate review under the proposed amendments to Articles 66 and 69 discussed later in this summary.

The Military Judiciary. The military judiciary provides the linchpin to a fair and effective military justice system and guarantees a fair and impartial tribunal. This Report makes several proposals to build on that foundation:

- *Selection criteria and tour lengths*. The Report proposes enhancing the stature, management, and public perception of the military judiciary by establishing in statute the foundational requirements for the qualification and appointment of military judges in Article 26 (Military judge of a general or special court-martial), with flexible criteria in the Manual for Courts-Martial. The primary authority for selection and certification of military judges would remain vested in The Judge Advocates General, including identification of a Chief Trial Judge for each Service, a position formally recognized in proposed changes to Article 26. The Judge Advocates General and the Commandant of the Marine Corps would assign military judges in accordance with minimum tour lengths established by the President in the Manual, subject to exceptions that could be invoked to meet military exigencies, or to grant a request for reassignment or retirement. These proposed changes are designed to promote the experience level of military judges and enhance public confidence in the independence of the military judiciary.

- *Pretrial judicial decisions*. A number of military justice decisions made prior to trial involve substantial legal issues. In order to reduce the number of issues that must be litigated at trial, and thereby increase efficiency in the court-martial process, this Report proposes to create a new statute, Article 30a (Proceedings conducted before referral), to provide statutory authority for judicial rulings on legal issues arising prior to trial. The new statute would authorize the President to identify the types of

issues appropriate for those proceedings, to establish procedures for such proceedings, and to specify available remedies. The statute would create authority for judicial rulings prior to referral on limited issues that currently must await judicial action until after referral. This authority would permit judicial review of, but not replace, command and convening authority decisions on those matters. Part II of the Report will consider rules to set forth particular issues for pretrial rulings, which could include, for example: review of pretrial confinement actions, requests for mental competency evaluations, requests for depositions, requests for individual military counsel, and ensuring that the protections afforded to victims under the Military Rules of Evidence are properly enforced in preliminary hearings.

- *Military magistrates*. The current and proposed role of military judges contains substantial potential for utilizing full and part-time military magistrates, akin to the federal system. The proposed Articles 26a (Military magistrates) and 30a also would provide the services with the option of establishing a military magistrate program, with qualifications and tour-length criteria separate from the criteria used for the certification of military judges. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps could appoint full or part-time military magistrates. The services could employ magistrates designated by military judges prior to referral to conduct pretrial hearings, act on designated pretrial matters, and preside with the consent of the parties in the proposed judge-alone special courts-martial discussed above. In these areas, military magistrates would act with full authority of military judges, with their decisions reviewed by military judges. The use of magistrates would permit a more efficient utilization of the military judiciary, and could provide a training and certification pipeline for future military judges.

Enhancing Fairness and Efficiency in Pretrial and Trial Procedures

Victims' Rights.

- *Article 6b*. In the NDAA FY 2014, Congress enacted Article 6b, which codifies victims' rights under the UCMJ and incorporates many provisions of the federal Crime Victims' Rights Act. This Report proposes to conform military law to federal law with respect to the relationship between the rights of victims and the disposition of offenses and with respect to the appointment of individuals to assume the rights of deceased, incompetent, or minor victims. This Report also would extend recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses to cover victims of all UCMJ offenses.

- *Implementing Article 6b*. As noted earlier, the President implements the UCMJ and prescribes rules for pretrial, trial, and post-trial procedure through the Rules for Courts-Martial. Part II of this Report will consider rules to implement the rights set forth in Article 6b and other victim provisions this Report proposes, as well as

enhancements to remedial options for violations of these rights.[36] The matters that will be considered in Part II will include, for example: the ability of the victim to be reasonably heard on the plea agreement, pretrial confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right to not be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.[37]

- *Additional proposals*. This Report's proposal regarding Article 32 (Preliminary hearing) also addresses the victim's opportunity to convey views on disposition of offenses to the convening authority. The proposal regarding Article 54 (Record of trial) increases access of victims of all offenses to trial records. The proposal to enact Article 140a (Case management; data collection and accessibility) would provide victims, counsel, and members of the public access to all unsealed court-martial documents. This Report would revise the current prohibition against stalking to address cyberstalking and threats to intimate partners (Article 130). This Report also proposes additional punitive articles that would address retaliation (Article 132) and specifically criminalize improper sexual activities with a recruit or trainee by a person in a position of special trust (Article 93a).

Investigative Subpoena Power. The optimal time for use of subpoena power often occurs during the conduct of an investigation, making it possible to develop and analyze information for use in the decision as to whether to prefer charges, whether a preliminary hearing should be ordered, and for consideration during a preliminary hearing. The Article 32 proceeding, as recently revised, serves primarily as a preliminary hearing rather than as an investigative tool and will operate most efficiently and effectively when based upon information compiled prior to the hearing. This Report proposes, through amendments to Article 46 (Opportunity to obtain witnesses and other evidence) and Article 47 (Refusal to appear or testify) to provide a process for making subpoenas and other process available independent of Article 32 during the earliest stages of an investigation.

[36] A recent executive order contains numerous provisions to implement Article 6b rights throughout the Manual for Courts-Martial. Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[37] Article 6b(a)(6) provides that a victim has the "right to receive restitution as provided in law." As a matter of current practice, non-statutory restitution may be included in pretrial agreements in guilty plea cases, *see*, *e.g.*, R.C.M. 705(c)(2)(C), and a limited form of restitution related to property damage is available outside the sentencing process in the form of deductions from pay under Article 139. The congressionally-chartered Judicial Proceedings Panel is considering whether additional options for restitution should be provided in connection with sexual offense proceedings. *See* NDAA FY14 at § 1731(b)(1)(D). In view of the limited jurisdiction of courts-martial over personal property and assets, development of an effective restitution program may require consideration of options outside the military sentencing process, and beyond the scope of this Report. Because such options would include consideration of administrative and judicial procedures outside the military justice system, this Report recommends that development of any statutory changes regarding restitution take place after the Judicial Proceedings Panel presents its recommendations.

The Article 32 Preliminary Hearing. This Report proposes to retain the core features of the Article 32 preliminary hearing as set forth in current legislation (NDAA FY 2014 and FY 2015). The proposal would focus the preliminary hearing on an initial determination of probable cause prior to referring charges to a general court-martial; require a more comprehensive preliminary hearing report; and provide an additional opportunity for the government, the defense, and victims to present information relevant to an appropriate disposition of the charges and specifications. The proposal would require the preliminary hearing officer to analyze and organize the information presented in a manner designed to enhance the utility of the hearing to the staff judge advocate and the convening authority in fulfilling their respective disposition responsibilities. The requirement for detailed analysis of this information for use in the disposition process would replace the current requirement for a disposition recommendation. Consistent with the recently enacted legislation, the preliminary hearing officer will be a judge advocate, equal to or greater in rank than the most senior counsel. Part II of the Report will address changes in the rules implementing Article 32 that would be required as a result of the proposed statutory amendments.

Discovery. The discovery rules applicable to courts-martial are addressed primarily in the Rules for Courts-Martial, which implement Article 46 and provide for robust and open discovery in military practice. Part II of this Report will consider proposed rule changes to strengthen the military's open discovery practice, which is intended to be timely and comprehensive. The Rules serve the goals of discovery in courts-martial, which include improving efficiency, preventing delays and surprise during trials, limiting gamesmanship, and permitting the accused to prepare adequately for trial and to present a defense, subject to limitations on classified and privileged information. Part II also will consider whether the President should establish a mechanism to address potential wrongful convictions that result from discovery violations or other factors.

Double Jeopardy. This Report proposes amending Article 44 (Former jeopardy), the prohibition against double jeopardy in military law, to conform to federal civilian practice by providing for jeopardy attachment when the members are impaneled following completion of challenges, or, if there are no members, when evidence is introduced on the merits of the charges.

Panel Member Selection, Panel Size, and Votes Needed to Convict.

- *Current Practice*. The composition of courts-martial has changed over time, from the thirteen-member panels required under the original American Articles of War, to the variable panel sizes permitted under current law—a minimum of three members for a special court-martial, a minimum of five members for a non-capital general court-martial, and a minimum of twelve members for a capital general court-martial. The use of a minimum number of members, rather than a standard number, means that the panel size can vary from case to case. The voting percentage also has changed, from a simple majority vote since the beginning of the Revolutionary War through World War I, to the varied system under the UCMJ: two-thirds for the findings in general and special courts-martial; three-fourths for sentences to confinement for ten years or more; unanimity in order to proceed to

capital sentencing in cases in which a death sentence is an authorized punishment; and unanimity for a death sentence. The variation in panel sizes means that the number of votes required for findings may vary substantially from trial to trial, even within the same category of court-martial, with percentages ranging from 67% to 80% depending on the number of members actually seated. Additionally, the variation in panel sizes complicates the member selection process because of the unpredictability in the number of panel members who ultimately will serve on the panel.

- *Providing consistency*. This Report proposes to provide consistency by standardizing the number of members for each type of court-martial through amendments to Article 16 (Courts-martial classified), Article 25a (Number of members in capital cases), and Article 52 (Number of votes required). The Report proposes four members for a special court-martial (with three votes required for a conviction); eight members for a non-capital general court-martial (with six votes required for a conviction); and twelve members for a capital general court-martial (with unanimity on the findings and sentence required for the death penalty). This proposal would establish a standard panel size, which would facilitate the detailing process, and also would establish a standard percentage of votes cast to convict (75 percent, with unanimity required to proceed to capital sentencing in cases in which a death sentence is an authorized punishment). Following voir dire, challenges, and final empanelment, the unseated prospective members left over from the venire would be free to return to their normal duties.

- *Panel selection*. This Report proposes to retain the current criteria in Article 25(Who may serve on courts-martial) for member selection by the convening authority, with two modifications. First, this proposal would eliminate the blanket prohibition against detailing enlisted panel members serving in the same unit as the accused and would permit such members to be detailed under the same conditions applicable to the detailing of officers from the same unit as the accused. Second, the proposal would amend Article 29 (Absent and additional members) to permit the convening authority to authorize alternate panel members, at his or her discretion. Under criteria to be established in the Rules for Courts-Martial in Part II of this Report, the convening authority would have initial discretion in panel composition to include selection of a panel of all enlisted members. The proposed criteria also would provide guidance for fulfilling a request by an accused, as under current law, for a panel composed of at least one-third enlisted members or all officers. The Report recognizes unique features of military practice by providing flexibility for a non-capital general court-martial to proceed with not less than six members when it becomes necessary, due to unforeseen circumstances, to excuse a member for good cause during trial.

Learned Counsel in Capital Trials and Appeals. Consistent with federal law and the law applicable to military commissions, this Report proposes amending Article 27 (Detail of trial and defense counsel) and Article 70 (Appellate counsel) to require that, to the greatest

extent practicable in capital cases, at least one defense counsel be learned in the law applicable to capital cases.

Reforming Sentencing, Guilty Pleas, and Pretrial Agreements

Sentencing Reforms. The Report proposes replacing the current sentencing system—which relies primarily on maximum punishments and which provides only minimal guidance regarding the adjudication of sentences below the maximum—with a system of judicial discretion guided by parameters and criteria.

- *Judicial sentencing.* The Report proposes, through an amendment to Article 53 (Court to announce action), that military judges adjudicate the sentence for each non-capital offense, consistent with the practice in federal proceedings and in the vast majority of states that rely on judges rather than juries to adjudicate non-capital sentences. Judicial sentencing would facilitate the use of parameters and criteria to enhance the potential for greater consistency in military sentencing and provide a better balance between individualized sentences and sentence uniformity. It also would facilitate consideration of a broader range of relevant information in the military sentencing process, and consideration of victim-impact statements, including unsworn statements. The judicial sentencing process also would make it easier to employ segmented sentencing, in which any confinement portion of a sentence would be adjudged for each offense, as discussed more fully below. These changes, along with the elimination of instructional issues, have the potential for a considerable reduction in appellate litigation and rehearings in the area of military sentencing.

- *Sentencing procedures*. The Report proposes to revise court-martial sentencing procedures through amendments to Article 56 (Maximum and minimum limits), by borrowing, with substantial modification, federal civilian practices to enhance the opportunity to achieve consistency, fairness, and justice in the adjudication of military sentences. Although it is not practicable to simply adopt the federal sentencing guidelines due to the many differences in the procedures, offenses, and types of punishments at courts-martial, the proposed sentencing reforms would endeavor to promote greater uniformity and predictability in military sentencing while allowing the military judge to exercise meaningful sentencing discretion in order to ultimately craft an individualized sentence for each offender.

- *Replacing unitary sentencing with segmented sentencing*. Under current practice, the court-martial adjudges a single sentence for all offenses resulting in a conviction, not a separate punishment for each offense. The proposal would adopt the practice in federal civilian courts and most state courts of adjudging a separate sentence for each offense with respect to confinement and fines. Where appropriate, the military judge would determine a sentence to confinement and a fine for each offense, and when the accused is convicted of multiple offenses, would determine whether terms of confinement should run consecutively or concurrently.

- *Replacing broad sentencing authority with sentencing guided by parameters and criteria*. Current law authorizes a court-martial to adjudge any punishment, or no punishment at all, subject only to the maximum punishments established under Article 56(a) or by statute, and by any mandatory minimum punishments established by statute. This proposal would replace the current sentencing process with a system based upon published standards developed by a new Military Sentencing Parameters and Criteria Board. The Military Sentencing Parameters and Criteria Board would collect and analyze sentencing data to inform determinations of appropriate parameters and criteria for specific offenses.

    - In general, a sentencing parameter is a boundary on the punishment that may be imposed for an offense, subject to departure for reasons set forth in the trial record. Sentencing criteria are factors that a judge must consider when sentencing a case, but that do not set a boundary on the punishment. The goal is to limit inappropriate disparity within a system that will largely maintain individualized sentencing and judicial discretion in sentencing.

    - The proposal involves discrete use of the sentencing experience developed in the civilian sector while maintaining the distinct characteristics of military sentencing, particularly with respect to unique military offenses and punishments. The military judge would be able to sentence outside the parameters, as may be warranted, with a written explanation on the record subject to review by the Courts of Criminal Appeals for abuse of discretion.

- The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging a sentence with little or no guidance. This proposal differs in important respects from the federal civilian guidelines, which are based upon a set of offenses and an offender population that is markedly different from the majority of individuals accused of criminal offenses in the armed forces. Under the proposal, the Chief Trial Judges of the Services would serve as the voting members of the Military Sentencing Parameters and Criteria Board. The Board will collect and analyze sentencing data, propose confinement parameters and sentencing criteria for approval by the President, and issue other sentencing policy guidance.

- *Implementation in two phases.* The development of comprehensive sentencing parameters and criteria will require detailed analysis of sentencing data involving the relationship between specific offenses and the sentence imposed for those sentences. Because the military justice system, unlike the federal civilian system and most state systems, does not currently utilize segmented sentencing (which provides a separate sentence for each offense), it will be necessary to implement sentencing parameters in two phases.

    - In the first phase, the President, with the advice of the Military Sentencing Parameters and Criteria Board, will issue interim guidance based upon an analysis of past experience in the military and civilian sectors. The interim guidance will be used by military judges as they apply the new sentencing

procedures, included segmented sentencing, in conjunction with the effective date of the legislation (one year after the date of enactment).

- In the second phase, the Military Sentencing Parameters and Criteria Board will conduct a detailed analysis of the data generated by military segmented sentencing. Based upon that analysis, the President will issue comprehensive sentencing parameters and sentencing criteria, which will take effect not later than four years after the enactment of the legislation. Upon implementation, the comprehensive sentencing parameters would replace the mandatory minimum sentences currently set forth in Article 56(b).

Guilty Pleas. This Report makes several proposals regarding military guilty plea practice and procedures.

- *Current procedures*. The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial process. Further, there may be subtle pressures inherent to the military environment that may influence the manner in which servicemembers exercise (and waive) their rights. The providence inquiry and a judge's explanation of possible defenses are established procedures which ensure that servicemembers knowingly and voluntarily admit to all elements of a formal charge. This Report proposes that the military justice system retain many of the procedures currently in effect under Article 45 (Pleas of the accused) to ensure that an accused's guilty plea at a court-martial is knowing and voluntary.

- *Proposed changes*. The Report proposes several changes to Article 45, including: an amendment to Article 45(b) to permit an accused to plead guilty in capital cases for offenses where death is not a mandatory sentence; and creation of paragraph 45(c), which would align military law with federal civilian law by applying the doctrine of harmless error to variances from Article 45.

Plea Agreements. This Report's proposals with regard to plea agreements align with those that would create sentencing parameters and criteria.

- *Create Article 53a*. This Report proposes to create a new statute, Article 53a (Plea agreements) that would continue those aspects of current practice in which a plea agreement is viewed as an agreement between the accused and the convening authority but that takes into account proposed sentencing by judge alone and the establishment of sentencing parameters and criteria. The convening authority would be responsible for entering into an agreement that reflects the interests of the government in general and the disciplinary interests of the unit in particular. As noted above with regard to guilty pleas, the military judge would continue to use the providence inquiry in accordance with R.C.M. 910 to ensure that the guilty plea is provident and that all plea agreement terms are lawful. This proposal also would retain present rules governing lawful terms, including the prohibition on requiring waiver of appellate review.

- *Military judge's responsibility*. Under the proposal, the military judge's responsibility would be to: (1) determine the legality of the plea agreement; (2) adjudge a sentence in accordance with the plea agreement; and, (3) take any other action on the sentence (e.g., make a recommendation on suspension) that is authorized under the rules. The military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful.

Streamlining the Post-Trial Process

This Report proposes to simplify post-trial processing of courts-martial in accordance with changes enacted in the NDAA FY 2014. The amendments to Article 60(Action by convening authority) enacted as part of the NDAA FY 2014 significantly restricted the convening authority's discretion to change the findings and sentence of a court-martial. The proposals in this Report reflect those restrictions by eliminating all redundant or unnecessary paperwork in cases where the recent legislation has removed the convening authority's post-trial discretion. In all general and special courts-martial, the military judge would make an "entry of judgment" incorporating the results of the court-martial and any actions taken by the convening authority within the limited scope permitted by the recent legislation. The proposed legislation also would provide a restricted authority to suspend sentences, which would be in addition to the authority under present law to include suspension as a term in a pretrial agreement. The new authority would be limited to cases where the military judge recommends suspension and the convening authority acts within the scope of the military judge's recommendation. The proposed changes in post-trial processing are set forth in Articles 60 through 60c.

Modernizing Military Appellate Practice

The current appellate process involves: (1) automatic review for matters of fact and law, as well as sentence appropriateness, by the service Courts of Criminal Appeals under Article 66 for those cases with a sentence to confinement for one year or more or a punitive discharge; (2) discretionary review of matters of law for good cause by the United States Court of Appeals for the Armed Forces under Article 67; (3) access to the Supreme Court for only those cases the Court of Appeals for the Armed Forces reviews under Article 67a. All other general courts-martial (except those where review is waived or withdrawn) receive a limited review by the Office of The Judge Advocate General under Article 69. All other special and summary courts-martial receive limited review by a judge advocate under Article 64. The government is entitled to interlocutory appeals in limited circumstances under Article 62.

The current appellate review process reflects the historical legacy of routine post-trial examination of cases in which lay officers acted as counsel, judge, and jury. Under the UCMJ, the military justice system has established a formal system of appellate review, involving judicial consideration of trials presided over by qualified judges involving parties

represented by qualified counsel. The development of a trial and appellate system with attorneys and judges has made it possible to adapt selected features of the federal appellate system for use in the military justice system.

This Report's proposals would modernize military appellate practice through amendments to Articles 56 (Sentencing), 62 (Appeal by the United States), 64 (Review by a judge advocate), 65 (Disposition of records), 66 (Review by Court of Criminal Appeals), 67 (Review by the Court of Appeals for the Armed Forces), 69 (Review in the office of the Judge Advocate General), and 73 (Petition for a new trial). In general, the proposals would:

- Permit the government to file interlocutory appeals in general and special courts-martial regardless of whether a punitive discharge may be adjudged (through amendment to Article 62).
- Clarify that the government may file an interlocutory appeal where the military judge enters a finding of not guilty following the return of a finding of guilty by members (through amendment to Article 62).
- Require appellate defense counsel to review the record of trial and provide the accused with advice regarding the filing of an appeal in all cases in which an accused is sentenced to confinement for more than six months, a punitive discharge, or in which the government has previously filed an interlocutory appeal (through amendment to Article 65).
- Revise the jurisdiction of the service Courts of Criminal Appeals to include all cases in which the accused files an appeal and in which an accused is sentenced to confinement for more than six months, a punitive discharge, or in which the government had filed an interlocutory appeal (through amendment to Article 66).
- Enhance the ability for all other appellants to have their cases reviewed by the service Courts of Criminal Appeals (through amendments to Articles 64, 65, 66, and 69).
- Transform the automatic appeal of non-capital cases to the service Courts of Criminal Appeals to an appeal of right and eliminate the requirement for the service Courts of Criminal Appeals to review the record of trial in non-capital cases where the appellant has not filed an appeal raising issues for the court's review (through amendment to Article 66).
- Provide for factual sufficiency review only when appellant raises the issue for the court's review and makes an appropriate showing that the court should dismiss the findings (through amendment to Article 66).
- Hear appeals as to sentence brought by either an appellant or, in appropriate circumstances, the government (through amendment to Articles 56 and 66).

- Require appropriate notification to the other Judge Advocates General prior to certification by a Judge Advocate General of an issue for review by the Court of Appeals for the Armed Forces (through amendment to Article 67).

- Expand the time limit for filing a petition for new trial from two to three years, consistent with practice in federal civilian courts (through amendments to Articles 69 and 73).

- Continue to require automatic review of capital cases and require, to the greatest extent practicable, at least one defense counsel who is learned in the law applicable to capital cases (through an amendment to Article 70).

- Establish harmless error standard of appellate review in guilty plea cases (through an amendment to Article 45).

Increasing Transparency and Independent Review of the Military Justice System

This Report makes two proposals that would increase transparency and require periodic independent review of the military justice system. Both would enhance the confidence of members of the armed forces and the public in military law and the operation of the military justice system.

Public Access. This proposal would establish a new statute, Article 140a (Case management; data collection and accessibility), that would require the Secretary of Defense to develop uniform case management standards and criteria that also would allow public access to court-martial dockets, pleadings, and records in a manner similar to that available in the federal civilian courts. This proposal envisions implementation across the services to ensure ease of access and management of data. In addition to the criticism made by the Response Systems Panel regarding the difficulty in gathering and analyzing military justice data, the Judicial Proceedings Panel recently recommended that DoD adopt an electronic system similar to that utilized by federal courts to ensure Special Victims' Counsel and victims have appropriate access to docketing information and case filings.

The Military Justice Review Panel. This proposal would enhance the efficiency and effectiveness of the UCMJ by amending Article 146 (Code committee) to establish a blue ribbon panel—the Military Justice Review Panel—composed of experts in military law and civilian criminal law, to conduct periodic reviews of the military justice system.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of the new legislation. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight-year cycle the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

The proposal is based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and

change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice. Accordingly, the comprehensive reviews are scheduled to occur every eight years.

The proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Improving the Functionality of the Punitive Articles and Proscribing Additional Criminal Acts

Finally, this Report proposes amendments to the punitive articles, those provisions of the UCMJ (Articles 77-134) that describe prohibited criminal acts, as follows:

Restructuring the Punitive Articles. This Report proposes migrating most of the prohibited conduct addressed by the President in the Manual for Courts-Martial under Article 134 (General article) into new statutory articles or existing enumerated statutory articles that proscribe related criminal conduct. In addition, the Report proposes a statutory clarification that would provide extraterritorial jurisdiction over all offenses otherwise covered by clause 3 of Article 134 (i.e., Title 18 offenses that currently must be prosecuted under other clauses of Article 134 when the underlying civilian offense does not have extraterritorial application).

Lesser Included Offenses. This Report proposes to provide notice of lesser included offenses, by establishing statutory authorization in Article 79 (Conviction of lesserincluded offense) for the President to designate a reasonably included offense as a lesser included offense.

Statute of Limitations. This Report proposes amending Article 43 (Statute of limitations) to adopt the federal civilian approach to child-abuse offenses (10 years when the victim is no longer alive); revising the period for fraudulent enlistment to cover the length of the enlistment or 5 years, whichever is longer; and extending the period when DNA testing implicates an identified person. This report also proposes to make the amendments apply to the prosecution of any offense committed before, on, or after the date the statute is enacted if the applicable limitation period has not yet expired.

Article 120 (Rape and sexual assault generally). This Report proposes aligning the definition of "sexual act" in military law with federal civilian law. The congressionally-chartered Judicial Proceedings Panel, which is giving extensive consideration to whether further changes to Article 120 are warranted, has recommended, and the Secretary of Defense has established a subcommittee of distinguished criminal law experts to examine Article 120. Pending the outcome of that review, this Report does not recommend further changes beyond the conforming changes needed to align Article 120 to the parallel provisions in federal civilian criminal proceedings.

Article 128 (Assault). The Report proposes aligning the definition of assault with federal civilian law, which would permit greater flexibility to address assaults involving domestic violence as an aggravating factor.

Article 130 (Stalking). This proposal would expand the current Article 120a to include cyberstalking.[38] The proposal also would update current law to address threats to intimate partners.

New Offenses Proposed:

- *Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust)*. This proposal would create a new statute that identifies persons (such as recruiters and drill sergeants) for whom sexual activity with other identified individuals (such as recruiting prospects or trainees) would be strictly prohibited without requiring additional proof of coercion or abuse. This would not preempt the services' authority to issue regulations under Article 92 (Failure to obey order or regulation) addressing matters such as fraternization that involve non-sexual as well as sexual conduct, nor would it preempt charges for rape or sexual assault under Article 120 that are based upon abuse of one's position in the chain of command to gain access to or coerce another person.[39]

- *Article 121a (Fraudulent use of credit cards, debit cards, and other access devices)*. This proposal would create a new statute that would specifically criminalize unauthorized use of another's credit or debit card.

- *Article 123 (Offenses concerning Government computers)*. This proposed new offense would criminalize accessing a government computer with an unauthorized purpose and is based on an analogous federal statute (18 U.S.C. §1030 (Fraud and related activity in connection with computers)). The proposed article is targeted to meet military needs and it applies only to persons subject to the code and is directed only at United States government computers.

- *Article 132 (Retaliation)*. This proposed new article would prohibit retaliation against victims and witnesses of crime. The offense would define retaliation as when a person, with the intent to retaliate against any person for reporting or planning to report an offense, or with the intent to discourage any person from reporting an offense, wrongfully takes or threatens to take an adverse personnel action against the person, or wrongfully withholds or threatens to withhold a favorable personnel action with respect to the person.

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[38] The current offense within Article 130 (Housebreaking) would be codified within Article 129 (Burglary).

[39] The Judicial Proceedings Panel is examining whether the definitions of rape and sexual assault in Article 120 should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person. *See* NDAA FY 2014 at § 1731(b)(1)(A). The proposal to create a new Article 93a addresses a related but different matter.

Conclusion

The current military justice debates provide an opportunity to consider changes that would enhance the vital role of the UCMJ in strengthening our national security. The Military Justice Review Group respectfully submits these recommendations for appropriate consideration.

Legislative Report

Section A. Background

The recommendations in this Report draw upon the history of American military justice and the specific responsibilities assigned to the Military Justice Review Group. Part 1 of this background section summarizes the structural development of the military justice system. Part 2 discusses the establishment and role of the Military Justice Review Group.

Part 1. Historical Perspective: Summary of Structural Changes in the Military Justice System

For purposes of providing background regarding the recommendations in this Report, this section provides a brief historical perspective highlighting major developments in the structure of military justice in terms of three historical phases.[1]

- The first phase (1775-1912), which established the structural foundation, began in the period leading up to the Declaration of Independence, and continued to the pre-World War I years in the 20th Century. In many significant respects, the court-martial process in 1912 closely resembled the structure of courts-martial at the time of the Revolutionary War.

- The second phase (1913-1941) introduced the first significant structural reforms. This phase began on the eve of World War I, and continued through the post-war debates about the administration of justice, the enactment of amendments that emerged from that debate, and the subsequent implementation of those amendments.

- The third phase (1941-present) began with a major national debate about the purposes and practices of military justice growing out of World War II experience. The third phase produced major structural changes, including enactment of the Uniform Code of Military Justice, implementation of the new legislation under the 1951 Manual for Courts-Martial, and subsequent periodic revisions to the Code and the Manual.

I. The First Phase: Foundation (1775 to 1912)

Prior to the Revolutionary War, Americans became familiar with courts-martial over the course of fighting four colonial wars with the British against the French. American colonists

[1] The modern military justice system was derived primarily from the Articles of War used by the Army. The other Services had their own disciplinary systems with many similarities to the Articles of War. The Navy was governed by Articles for the Government of the Navy. The Coast Guard followed Regulations for the U.S. Revenue-Cutter Service, as it was first known. The Marine Corps was subject to the Navy articles, except when detached for service with the Army by order of the President.

fighting with the British Army in those conflicts were subject to trial by courts-martial under the British Articles of War.[2] America's future Commander in Chief—George Washington—presided over at least one British general court-martial while serving as a colonel in the First Virginia Regiment.[3]

In the year leading up to the Declaration of Independence, the Continental Congress focused on the steps necessary to secure liberty and prepare for armed conflict. After the Battles of Lexington and Concord on April 19, 1775, the Continental Congress organized the colonial fighters and militia converging on Boston into a unified military force—the Continental Army—with George Washington as its Commander in Chief. Shortly thereafter, the Continental Congress enacted the American Articles of War to govern the newly created army.[4] The articles required members of the Continental Army to take an oath of allegiance, prescribed the duties of soldiers and officers, listed punishable offenses, and authorized punishments and modes of trial by courts-martial. Over the next few months, General Washington determined that the list of crimes and related punishments in the American Articles of War were insufficient to meet the needs of the Continental Army, and he asked Congress to add more capital offenses and increase the authorized punishment in several articles.[5] Congress made the requested changes.[6]

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[2] British Articles of War of 1765, Section XIX, art. I, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 946 (photo reprint 1920) (2d ed. 1896).

[3] Frederick Bernays Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 5-6 (1989). In a letter of instruction, Washington reminded his junior officers of the importance of discipline: "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all." George Washington, Letter of Instructions to the Captains of the Virginia Regiments (29 July 1759).

[4] American Articles of War, enacted June 30, 1775, *reprinted in* WINTHROP, *supra* note 2, at 953. The American Articles borrowed heavily from the Massachusetts Articles of War, enacted April 5, 1775. *See id.* at 947. The Provisional Congress of Massachusetts Bay had enacted its own modified version of British Articles of War for the government of its militia. Gerald F. Crump, *Part I: A History of the Structure of Military Justice in the United States, 1775-1920*, 16 A.F. L. REV. 41, 42-44 (1974). The American and the Massachusetts versions differed from the British version in that, except for the three capital offenses, they limited the types of punishment that could be imposed. *Id.* In non-capital cases, the maximum allowable punishments were a dismissal or discharge out of the Army, whipping not exceeding thirty-nine lashes, a fine of up to two months of pay, and imprisonment for one month. *See* AW 51 of 1775.

By taking an active role in revising the articles, the Continental Congress underscored the responsibility of the civilian legislature in establishing the basic rules of military justice, as expressly established in the Constitution. *See* U.S. CONST. art I, § 8, cl. 14 (setting forth the power of Congress "to make rules for the Government and Regulations of the land and naval Forces").

[5] *See* UNITED STATES ARMY JUDGE ADVOCATE GENERAL CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 10-13 (1975) [hereinafter THE ARMY LAWYER].

[6] Additional Articles, enacted November 7, 1775, *reprinted in* WINTHROP, *supra* note 2, at 959. On November 28, 1775, Congress also adopted Rules for the Regulation of the Navy of the United Colonies of North America. These rules, according to John Adams, were based on the British Regulations and Instructions Relating to His Majesty's Service at Sea, published in 1772. The Adams Papers Digital Edition: Papers of John Adams, Vol. 3, May 1775–Jan. 1776, *in* UNIVERSITY OF VIRGINIA PRESS, ROTUNDA (C. James Taylor ed., 2008-2015) [hereinafter

In response to Washington's concerns about the state of discipline, a committee led by John Adams recommended a new and enlarged version of the articles, modeled more closely on the original British articles.[7] Acting on the committee's recommendations, Congress enacted a new version of the American articles in 1776.[8]

Through the balance of the 18th and 19th Centuries, as America obtained its independence, adopted the Constitution, and engaged in a variety of military conflicts of varying size, duration, and location, the basic structural components of the 1776 Articles remained in place.[9] The following describes the primary features of military justice during this foundational period.

A. Purpose of Military Justice during the foundational period

The military justice system was designed to instill good order and discipline by punishing neglects, disorders, and other offenses. Most offenses listed in the Articles of War were unique to the military and had no counterpart in civilian criminal codes.

Military-specific offenses punishable by court-martial included desertion,[10] absence without leave,[11] contemptuous or disrespectful words against the President or the

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The Adams Papers]. The Navy court-martial at that time bore many similarities in appearance to the Army court-martial, but in contrast to the Army's Articles of War, the Navy's Articles remained substantially unchanged until the adoption of the Uniform Code of Military Justice in 1950. Robert S. Pasley, Jr. & Felix E. Larkin, *The Navy Court-Martial: Proposals for Its Reform*, 33 CORNELL L. REV. 195, 197-98 (1947).

[7] *See* Wiener, *supra* note 3, at 6 n.34 (quoting DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 409 (L.H. Butterfield ed. 1961)); Crump, *supra* note 4, at 44; *see also* THE ARMY LAWYER, *supra* note 5, at 10-11 (General Washington was sent a letter by Colonel Tudor, Judge Advocate General, complaining about the insufficiency of the Articles of War and requesting their revision).

[8] In non-capital cases, the maximum for whippings was increased to 100 lashes and the limitations on the fine and imprisonment were eliminated. AW, § 18, art. 3 of 1776. In the Navy, the commander could inflict on a seaman twelve lashes on his bare back with a cat of nine-tails. RULES FOR THE REGULATION OF THE NAVY OF THE UNITED COLONIES OF NORTH AMERICA, art. 4 (November 28, 1775) [hereinafter 1775 RULES OF THE NAVY]; An Act for the Government of the Navy of the United States, art. 4 (March 2, 1799).

[9] For much of this era, the United States maintained relatively small land and naval forces, with substantial increases occurring during conflicts such as the War of 1812, the Mexican-American War, the Civil War, and the Spanish American War (followed by the conflict in the Philippine-American War). Crump, *supra* note 4, at 45-54 (noting that court-martial practice was stable and military law had remained almost unchanged for 135 years). Congress revised the Articles of War in 1786, 1806, and 1874. *See* WINTHROP, *supra* note 2, at appendices 11-13; *see also* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 49 (1958). In addition to the three revisions of the Articles, Congress approved a variety of amendments during the foundational period. *See* Crump, *supra* note 4, at 46-54; David A. Schlueter, *The Court-Martial: An Historical Survey,* 87 MIL. L. REV. 129, 150-55 (1980).

[10] AW, § 6, art. 1 of 1776; AW 48 of 1874. In the Revolutionary War, the most common offense tried by court-martial was desertion. One survey of available records from this period showed that nearly 44 percent of courts-martial (1,162 of 2,666 cases) were trials for desertion. JAMES C. NEAGLES, SUMMER SOLDIERS: A SURVEY & INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL 34 (1986).

[11] AW, § 6, art. 2 of 1776; AW 21 of 1806; AW 34 of 1874.

Congress,[12] contempt or disrespect towards the commander,[13] mutiny and sedition,[14] striking a superior officer or failing to obey a lawful command,[15] misbehavior before the enemy,[16] being drunk on duty,[17] and sleeping on post.[18] The court-martial also had the power to punish all other non-capital crimes not mentioned in the Articles of War that affected good order and discipline.[19] Except for desertion or some other impediment in which the accused was not amenable to justice, the Articles of War imposed a two-year statute of limitations on all crimes punishable by court-martial.[20]

In peacetime, capital crimes such as murder and rape could only be prosecuted in civilian court.[21] The Articles of War required the commanding officer, upon request of the injured party or parties, "to use his utmost endeavors" to deliver soldiers accused of committing crimes "punishable by the known laws of the land" to the civil magistrate for trial.[22] A commanding officer who failed to deliver the soldier to the civil magistrate was himself liable to be tried by court-martial and cashiered out of the service for this failure.[23] The Articles of War thus expressed a preference in peacetime for trying common law crimes in civilian courts.[24]

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[12] AW 5 of 1806; AW 19 of 1874. The pre-1806 versions did not mention the President, since the office was created by the Constitution. *See* AW, § 2, art. 1 of 1776 (referring only to Congress and the local legislature).

[13] AW, § 2, art. 2; AW 6 of 1806; AW 20 of 1874. The first court-martial in the U.S. Revenue-Cutter Service (the Coast Guard's predecessor) for this type of offense occurred on 7 December 1793 aboard the Revenue Cutter MASSACHUSETTS. The offender, Third Mate Sylvanus Coleman of Nantucket, was summarily dismissed from the service for "speaking disrespectfully of his superior officers in public company. . . insulting Captain John Foster Williams [the commanding officer] on board. . ." and for writing an order in the name of the commanding officer. HORATIO DAVIS SMITH, EARLY HISTORY OF THE UNITED STATES REVENUE MARINE SERVICE 1789-1849 7 (1932), *available at* http://www.uscg.mil/history/articles/USRCS1789-1849.pdf.

[14] AW, § 2, art. 3 of 1776; AW 7 of 1806; AW 22 of 1874.

[15] AW, § 2, art. 5 of 1776; AW 9 of 1806; AW 21 of 1874.

[16] AW, §13, arts. 12-14 of 1776; AW 42 of 1874.

[17] AW 45 of 1806; AW 38 of 1874.

[18] AW 46 of 1806; AW 39 of 1874.

[19] AW, § 18, art. 5 of 1776; AW 99 of 1806; AW 62 of 1874.

[20] AW 88 of 1806; AW 103 of 1874.

[21] In 1874, the Articles of War listed the common-law offenses that could be punished *in time of war* without any showing that the offenses were prejudicial to good order and discipline: larceny, robbery, burglary, arson, mayhem, manslaughter, murder, rape, and assault and battery with intent to kill, wound, murder, or rape. AW 58 of 1874.

[22] AW, § 18, art. 5 of 1776; AW 33 of 1806; AW 59 of 1874.

[23] AW, § 18, art. 5 of 1776; AW 33 of 1806; AW 59 of 1874.

[24] The British Articles of War also imposed a duty on the commanding officer to deliver any officer or soldier accused of a capital crime or of using violence against civilians to the civil magistrate for trial. British AW, §

Because the military justice system was different from the common law system, Congress required that everyone joining the military must have the Articles of War read to them by the person enlisting them, or by their commanding officer, before taking their oath of military service.[25] Thereafter, the articles were to be read and published in every garrison, regiment, troop, or company every two months to remind all officers and soldiers of their duty to observe and follow them.[26]

B. Investigation and charging during the foundational period

Any person, civilian or military, could complain about a soldier to any commissioned officer. The officer then signed formal charges to initiate the court-martial process.[27] This legal act of a commissioned officer signing formal charges against an accused was called a "preferral" of charges. The preferred charges were then forwarded to the accused's commanding officer for his approval, accompanied by a request or recommendation that the charges, if approved, be "referred" to trial by court-martial.[28] If the commanding officer found it more appropriate for a charge to be disposed of without trial, the charges were not preferred at all; or, if charges were preferred, the commanding officer dismissed them.

As soon as a commissioned officer preferred formal charges, the accused was placed under arrest and confined until tried by court-martial.[29] Although the arrest could legally be made by any commissioned officer, it was ordinarily made by the accused's immediate commanding officer.[30] The accused was also relieved of all military duties while under arrest. The Articles of War limited the period of arrest to eight days, or until the trial could be held, whichever came first.[31]

There was no formal requirement for a preliminary investigation under the Articles of War before preferring charges and forwarding them to the appropriate commanding officer.

11, art. 1 of 1765. This provision explains why the British soldiers accused of murder and defended by John Adams for their role in the Boston Massacre were tried in civilian court.

[25] AW, § 3, art. 1 of 1776; AW 10 of 1806; AW 2 of 1874. It was important for a soldier to learn about the Articles of War, because the soldier was now subject to a legal system distinct from the civilian system. The articles contained many offenses unique to the military, and ignorance of the law was not a defense to a violation of the articles.

[26] AW, § 18, art. 1 of 1776; AW 101 of 1806; AW 128 of 1874 (articles were to be read and published every six months). In the Navy, the rules were hung up in a public part of the ship and read once a month to everyone. An Act for the Better Government of the Navy of the United States, art. 25, § 16 (July 17, 1862) [hereinafter 1862 ROCKS AND SHOALS]; 1775 RULES OF THE NAVY, *supra* note 8, at art. 7.

[27] WINTHROP, *supra* note 2, at 153.

[28] *Id*. at 154 ("By *preferring to* is meant officially addressing and forwarding to the commander, through the proper military channels, (or directly where permissible), the formal charges . . . .").

[29] AW, § 14, art. 15 of 1776; AW 77, 78 of 1806; AW 65, 66 of 1874.

[30] WINTHROP, *supra* note 2, at 123.

[31] AW, § 14, art. 16 of 1776; AW 79 of 1806; AW 70 of 1874.

However, prior to preferral, the normal practice was that the charges should be supported by *prima facie* evidence or by a proper preliminary investigation before preferral.[32] Otherwise, an unsupported charge would result in the initial arrest and confinement of an innocent person as well as the needless waste of time at the trial, if the unsupported charge went to trial. It was a neglect of duty to bring frivolous or malicious charges, and such neglect often resulted in censure or severe punishment.[33]

After the charges were preferred and the accused arrested, a judge advocate served the accused with a copy of the formal charges[34] and forwarded them, along with a recommendation as to the disposition of the charges, to the commanding officer.[35]

C. Convening the court-martial during the foundational period

After receiving a copy of the formal charges, the commanding officer had complete discretion regarding whether to try the charges by court-martial and the type of court-martial that should hear the charges.[36] To convene a court-martial, the commanding officer published an order announcing the place and time of trial, the name of the person or persons to be tried, and the appointment of all court-martial personnel, which included the persons to serve as court members (judge and jury) and as the judge advocate (prosecutor). As discussed below, the number of personnel required to serve as members of the panel depended on the type of court-martial selected.

The commanding officer could elect between two types of court-martial: the general court-martial and several inferior courts-martial. The main distinctions between the two types of

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[32] WINTHROP, *supra* note 2, at 150-51.

[33] *Id*. at 151 n.19.

[34] AW 77, 78 of 1806; AW 71 of 1874.

[35] During the Revolutionary War, some officers brought charges against fellow officers to revenge slights and insults. NEAGLES, *supra* note 10, at 29. Others requested trial by a court-martial as a means to vindicate their honor and to clear themselves of wrongdoing. THE ARMY LAWYER, *supra* note 5, at 15. General Charles Lee, for example, demanded a court-martial after General George Washington reprimanded him for disobeying orders and making an unnecessary retreat at the Battle of Monmouth. General Lee was found guilty.

In 1786, Congress created the court of inquiry to prevent the misuse of courts-martial as an outlet for the jealousies and animosities that sometimes permeated the officer corps. The court of inquiry provided the means by which an impartial body could look "into the nature of any transaction of, or accusation or imputation against, any officer or soldier." EDWARD M. COFFMAN , THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898 32 (1986). A court of inquiry had three members whose duty it was to examine the allegations and to pronounce a conclusion on the facts. The Navy also had courts of inquiry. 1862 ROCKS AND SHOALS, *supra* note 26, at arts. 23-24. Because courts of inquiry could be also abused—or, according to the 1874 Articles of War, ". . . perverted to dishonorable purposes, and . . . employed, in the hands of weak and envious commandants, as engines for the destruction of military merit"—the Articles prohibited commanding officers from ordering them "except upon demand by the officer or soldier whose conduct is to be inquired of." AW 115 of 1874.

[36] AW 2 of 1786; AW 65 of 1806; AW 72 of 1874. The judge advocate performed the duties described below. The Navy only had the general court-martial from 1774 until 1855. Pasley & Larkin, *supra* note 6, at 198.

courts were the number of commissioned officers appointed as members and the maximum punishment the court-martial could impose.

1. General Court-Martial

The general court-martial was the only court-martial that could adjudge a sentence imposing the maximum punishment authorized under the Articles of War, and it was the only forum empowered to try officers. It was also the only court-martial in which the commanding officer was required to appoint a judge advocate.[37]

The commanding officer appointed between five and thirteen commissioned officers to serve as members of the general court-martial. Although the Articles of War required the commanding officer to appoint thirteen officers "where that number can be convened without manifest injury to the service," after the Revolutionary War, the Articles were amended to require the appointment of at least five members.[38] The actual number appointed was solely within the discretion of the commanding officer.[39] The general court-martial could adjudge a sentence containing any punishment authorized under the Articles of War for the offenses charged, to include the death penalty.[40] Other authorized punishments included imprisonment, fines or forfeiture of pay, and dismissal from the military.[41] The Articles of War typically authorized the general court-martial to sentence

[37] AW 2 of 1786; AW 65 of 1806; *see also* WINTHROP, *supra* note 2, at 158.

[38] AW 64 of 1806. During the Revolutionary War, the general court-martial had at least 13 commissioned officers as its members. AW, § 14, art. 1 of 1776. After the War, the Army was disbanded, leaving a total of about 80 persons in the entire Army, scattered across the country to guard munition depots, which made it difficult for any commander to convene a court-martial with 13 officers on the panel. In 1786, Congress reduced the minimum number of officers needed to five, while stating a preference for 13, if they could be assembled "without manifest injury to the service." AW 1 of 1786. Since 1786 when the Army almost did not exist, Congress has kept the minimum number at five members, except for the trial of capital offenses, where there must be 12 members before a death sentence can be imposed. AW 5 of 1920 (eliminating the five-to-thirteen officer requirement and simply requiring that the number of officers cannot be "less than five"). *But see* the current version of Article 25(a) (requiring at least 12 members in capital cases if they are "reasonably available"). The Navy general court-martial also consisted of between five and 13 commissioned officers. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 11. The 1775 Navy rules required at least six commissioned officers, three Captains and three lieutenants, and the eldest captain presided. 1775 RULES OF THE NAVY, *supra* note 8, at art. 39. The U.S. Revenue-Cutter Service (the predecessor service to the modern Coast Guard) had two courts. The minor court—convened by the commanding officer—was to consist of not less than three commissioned officers. The general court—convened only at the direction of the President or the Secretary of the Treasury—was also composed of no less than three commissioned officers. REGULATIONS FOR THE U.S. REVENUE-CUTTER SERVICE, arts. 1110, 1134 (1907).

[39] Martin v. Mott, 25 U.S. 19 (1827) (the commander's decision as to the number of court members to be appointed without manifest injury to the service is a matter for his sound discretion and is conclusive).

[40] *See, e.g.*, AW, § 2, art. 3 of 1776 (mutiny), art. 4 (failure to suppress mutiny), art. 5 (striking a superior officer), §6, art. 1 (desertion). In the Navy, the death penalty was also available. *See, e.g.*, 1862 ROCKS AND SHOALS, *supra* note 26, at art. 3, ¶1 (mutiny), ¶2 (disobedience to a superior's lawful orders), ¶3 (sharing intelligence with the enemy), ¶¶ 4, 6 (desertion), ¶7 (hazarding a vessel), ¶9 (cowardice), and art. 5 (murder).

[41] *See, e.g.*, AW, § 12, art. 1 of 1776 (forfeiture of pay and dismissal for misappropriating military property).

the accused "according to the nature of the offense,"[42] or "in the discretion of the court-martial."[43] In addition to the better known punishments, others included flogging, ear cropping, being marked with indelible ink, confinement in dark holes, dunking in water, and forced labor with a ball and chain.[44] The findings and sentence of a court-martial were not complete or final, and could not be executed, until they were approved by the commanding officer who convened the court-martial.[45]

2. Inferior Courts-Martial

During various periods of time in the foundational phase, a number of different types of inferior courts-martial were available to commanding officers—the regimental court-martial, the garrison court-martial, the field-officer court, and the summary court. All inferior courts-martial typically involved the same maximum punishment: a fine of one month's pay, imprisonment for one month, and hard labor for one month.[46]

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[42] *See, e.g.*, AW, § 2, art. 2 of 1776 (contempt, disrespect).

[43] *See, e.g.*, AW, § 6, art. 2 of 1776 (absence without leave).

[44] Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 8 (1987); *see, e.g.*, AW, §7, art. 2 of 1776 (authorizing corporeal punishment for sending a challenge to duel). The 1874 Articles of War finally prohibited these punishments. AW 98 of 1874 ("No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.").

[45] *See* Part VI, "Commanding Officer Review," *infra*.

[46] The regimental court-martial (convened by a regimental commander) and the garrison court-martial (convened by a garrison commander) were identical in structure. Both were used solely to try enlisted soldiers for non-capital offenses with the limited punishment described above. AW 83 of 1874. Corporeal punishment was also often part of the sentence. Both courts required the commanding officer to detail at least three court members, but there was no requirement to appoint a judge advocate. AW 82 of 1874. The regimental and garrison courts-martial used the same procedures as the general courts-martial. The adjudged sentence was executed only after being approved by the commanding officer who convened the court-martial. AW 109 of 1874.

The field-officer court was first created in 1862 for use in the Civil War, and was later incorporated into the 1874 Articles of War. The field-officer court, when available, replaced the regimental and garrison courts-martial. AW 83 of 1874. Like the regimental and garrison courts-martial, the field-officer court could only try enlisted soldiers for non-capital offenses. AW 80 of 1874. The field-officer court consisted of a field grade officer (a major, lieutenant colonel, or colonel) who the commanding officer (normally the regimental commander) detailed to sit alone as a single court member. WINTHROP, *supra* note 2, at 491. No judge advocate was detailed. The maximum punishment the field-officer court could impose on a soldier was the same as the maximum permitted for the regimental and garrison courts-martial. The sentence of a field-officer court was executable only after approval by a senior commanding officer, normally the brigade or post commander. AW 110 of 1874.

The summary court was created in 1890 to replace the regimental and garrison courts-martial. The summary court consisted of a single court member, usually the commissioned officer who was second in command. The summary court was held within 24 hours of the accused's arrest, and, unlike the other inferior courts-martial, the accused had a right to object to this proceeding and could demand a general court-martial. The maximum sentence a summary court could adjudge was the same as the other inferior courts-martial. AW 83 of 1874. The sentence was executed after being approved by the commanding officer convening the court.

D. Trial Procedure during the foundational period

1. Selection of Court Members

The commanding officer authorized to convene the court-martial selected its members from the officer corps. The commander had broad authority in the selection of members, subject to the requirement that members not be of a rank inferior to the accused "if it can be avoided."[47] If the accused challenged any court member for cause, the other court members voted to decide whether the challenge had any merit.[48] Court members could be removed, even during trial, as long as the number did not fall below the minimum required. When a member of the militia faced trial by court-martial, militia officers of the same provincial corps as the offender had to compose the entire panel.[49]

2. The Court President

The senior member of the court-martial was its president, or presiding officer.[50] The court president, however, was not a judge nor was he required to have formal training in the law. He was a regular officer like the other detailed members. He presided over the court-martial by opening the court, calling it to order, and announcing its adjournment when the court-martial voted to adjourn.[51] The president was also the channel of communication with the commanding officer responsible for convening the court-martial.[52] The court-

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In 1909, Congress created for the Navy the "deck court," which was similar to the Army's summary court. Pasley & Larkin, *supra* note 6, at 198 n.14 (citing 35 Stat. 621 (1909) and 39 Stat. 586 (1916)). The "deck court" was a single officer appointed to try enlisted men for minor offenses. U.S. Department of the Navy, NAVAL COURTS AND BOARDS B-66 (2d ed. 1945) [hereinafter NAVAL COURTS AND BOARDS] at B-66. The maximum punishment that could be adjudged was confinement and forfeiture of pay for 20 days; the sentence was executed after it was approved by convening authority. The U.S. Revenue Cutter Service had only two courts, the minor court and the general court. REGULATIONS FOR THE U.S. REVENUE-CUTTER SERVICE, art. 1107 (1907). Punishments for officers included dismissal, suspension, forfeitures, imprisonment for two years, reduction in rank and reprimand. *Id.* at art. 1171. Punishment for enlisted members included dishonorable discharge; forfeitures; confinement for one year; confinement in irons, on bread and water, for 30 days; reduction in rank, deprivation of liberty for three months; and extra duties. *Id.* The Revenue Cutter Service and the Lifesaving Service merged to form the Coast Guard in 1915. The newly formed Coast Guard initially maintained the original two courts, but later added the deck court, with similar punishments as the Navy. COAST GUARD COURTS AND BOARDS, arts. 41-49 (1923).

[47] AW 11 of 1786; AW 75 of 1806; AW 79 of 1874.

[48] AW 71 of 1806; AW 88 of 1874. The naval court-martial followed the same procedure of having its members decide challenges for cause. NAVAL COURTS AND BOARDS, *supra* note 46, at § 390.

[49] AW, § 17, art. 1 of 1776; AW 97 of 1806; AW 77 of 1874 ("Officers of the Regular Army shall not be competent to sit on courts-martial to try the officer or soldiers of other forces.").

[50] WINTHROP, *supra* note 2, at 170. Until 1828, the court president was specifically detailed. Thereafter the court president was no longer designated in the convening order but was simply the senior member.

[51] *Id.* at 171.

[52] *Id.* at 173.

martial president acted for and in the name of the court-martial, but was in every other way an equal of the other court members.

3. The Court Members as judge and jury

Some of the members' powers were comparable to those of a judge, and others were comparable to those of a jury.[53] No judge presided over the court to instruct the members on the law, and there were few rules of procedure and evidence.[54] The members were responsible for determining both the law and the facts. The court members took an oath in which they swore "to duly administer justice" according to the Articles of War, but "if any doubt should arise" in which the Articles did not adequately explain the law, then they should decide the case "according to your conscience, the best of your understanding, and the custom of war in like cases."[55]

4. The Judge Advocate

The Articles of War required the commanding officer to detail a judge advocate to every general court-martial. A judge advocate, when detailed, could advise the members of the court. The judge advocate, however, was not necessarily a lawyer, and the court members were not required to follow his advice.[56] The judge advocate did not have to be a commissioned officer or even a member of the military.[57] The American legal profession at

[53] *Id*. at 54-55.

[54] The first Manual for Courts-Martial to prescribe rules and procedures for use in courts-martial was published in 1895. In federal civilian courts at that time, state law provided the rules of criminal procedure. The Judiciary Act of 1789 directed federal courts to apply the law of the state in which the court was seated. *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73. In 1940, Congress gave the Supreme Court authority to publish rules of criminal procedure. Sumners Courts Act, 76 Pub. L. No. 675, 54 Stat. 688 (1940). The Federal Rules of Criminal Procedure took effect in 1946. Congress enacted the Federal Rules of Evidence in 1975. Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[55] AW 6 of 1786; AW 69 of 1806; AW 84 of 1874; *see also* AW, § 14, art. 3 of 1776. This oath was received by court members serving on general, regimental, and garrison courts-martial. No oath was prescribed for the field-officer court. WINTHROP, *supra* note 2, at 492. The absence of anyone with legal training at a court-martial was not necessarily that different from civilian practice during that era, depending on the location. Many common law judges of the post-Colonial period were also untrained in the law and there were few legal reports available. THE ARMY LAWYER, *supra* note 5, at 11; G. Edward White, *The Path of American Jurisprudence*, 124 U. PENN. L. REV. 1212, 1214 (1976). High-level judgeships were often held by non-lawyers throughout the eighteenth century. An untrained judge is reported to have told a jury "to do justice between the parties, not by any quirks of the law out of Coke or Blackstone—books that I never read and never will—but by common sense as between man and man." *Id.* at 1213 n.5 (footnote omitted).

[56] In common law courts, even when instructed on the law by judges, the jury decided the law and the facts, sometimes ignoring judicial instructions and "finding the law" themselves. White, *supra* note 55, at 1216; J. R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123 (1993). Juries had wide latitude to decide the law, especially the colonial jury, which had a more active role and was a stronger institution. *Id.* at 129. Naval court members were also free to disregard the advice of the judge advocate. *See* NAVAL COURTS AND BOARDS, *supra* note 46, at § 400.

[57] WINTHROP, *supra* note 2, at 183-84 (citing instances where enlisted and civilians were known to act as judge advocate). The Navy had never placed a high premium on lawyers in uniform. As late as World War I, the

that time was not fully developed, and lacked a formal structure for education, achievement, and specialization.[58] The judge advocate had three legal duties to perform under the Articles of War: to prosecute the case in the name of the United States;[59] to administer the oath of office to the court members;[60] and to protect the interests of the accused in limited ways.[61]

The judge advocate represented the public interest and thus had a duty to do justice, not merely to convict.[62] Accordingly, he was expected to call all witnesses with knowledge of the alleged offense and not solely those witnesses whose testimony was favorable to the prosecution.[63] Moreover, the judge advocate owed two duties to the accused: to object to any leading question posed to any of the witnesses, and to object to any question asked of the accused which might elicit an incriminating answer.[64]

5. Defense Counsel

Navy Judge Advocate General boasted that there was not a single lawyer on his staff. Edmund M. Morgan, *The Background of the Uniform Code of Military Justice,* 28 MIL. L. REV. 21 (1965).

[58] White, *supra* note 55, at 1214.

[59] AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 90 of 1874. The 1775 Articles of War did not mention the judge advocate. The judge advocate in the Navy had the same duties as the judge advocate in the Army. NAVAL COURTS AND BOARDS, *supra* note 46, at § 400.

[60] AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 84 of 1874. After the judge advocate administered the oath to each member, the court president then administered an oath to the judge advocate to bind him not to disclose the vote or opinion of any particular member of the court-martial. *Id.* In 1775, the court members received their oath from the court president, who was then sworn by the court member next in rank. AW 33 of 1775.

[61] AW 6 of 1786; AW 69 of 1806; AW 84 of 1874. The Articles of War decreed that the judge advocate was to "consider himself counsel for the prisoner" for the limited purpose of objecting to certain types of questions posed to witnesses or the accused. *Id.* The Navy judge advocate had the same duty to protect the interests of an accused without counsel. NAVAL COURTS AND BOARDS, *supra* note 46, at § 401. While having in mind his duties as prosecutor, he was to advise the accused against advancing anything that would tend to incriminate him or prejudice his case. *Id*. Furthermore, he was to see that no illegal evidence was brought against the accused and was to assist him in presenting to the court a defense, including evidence in extenuation or mitigation as well as evidence of previous good conduct and character. *Id*. The U.S. Revenue Cutter Service rules for courts required that "[a] commissioned officer, cadet (if serving on a cruising vessel), warrant officer, or petty officer may be permitted to appear as counsel for the accused at the request of the latter." REGULATIONS FOR THE U.S. REVENUE-CUTTER SERVICE, art. 1110(3) (1907). Following formation of the Coast Guard in 1915 the right to counsel was retained and expanded. REGULATIONS FOR THE UNITED STATES COAST GUARD, art. 2143 (1916).

[62] WINTHROP, *supra* note 2, at 197 (noting that the judge advocate was also a "minister of justice").

[63] *Id*. at 193-94.

[64] AW 6 of 1786; AW 69 of 1806; AW 90 of 1874. Neither the 1775 nor the 1776 Articles of War prescribed these duties.

Practice under the early Articles of War generally preluded participation by defense counsel at trial.[65] These restrictions were relaxed over time, and by the late 19th Century had become obsolete.[66] As in civilian life at that time, and well into the 20th Century, the right of an accused to representation by counsel was limited to those who could afford an attorney.[67]

6. Presentation of the case

The trial proceedings, which were open to the public, could be held only between the hours of eight in the morning and three in the afternoon.[68] The prescribed hours were intended

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[65] Until the late 19th Century, the accused had no right to counsel, and defense counsel were not allowed to participate in courts-martial. WINTHROP, *supra* note 2, at 166. The proceedings of some courts-martial had been disapproved solely because a defense counsel had participated at trial. THE ARMY LAWYER, *supra* note 5, at 29. General William Hull claimed legal error in his court-martial because he had been denied his Sixth Amendment right to counsel, but the denial was approved by no less an authority than the father of the Bill of Rights himself, President James Madison. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 284 (1958).

Here the court-martial was no different than the English common law where *no* accused felon had counsel. J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW AND HIST. REV. NO. 2, 221 (1991). Blackstone wrote in 1765, "It is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated." WILLIAM S. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, vol. IV, at 355 (1765). In Great Britain, it was not until 1836 that Parliament granted accused felons the right to counsel. Beattie, *supra*, at 222 (discussing the Prisoner's Counsel Act of 1836); Wiener, *supra* note 9, at 4 (discussing the same). But the American colonies were ahead of the English common law. By 1791, seven states had guaranteed the right to counsel in their constitutions and two others made them available by statute or practice. *Id.* at 4-5.

The judge advocate serving as prosecutor had a duty to protect the rights of the accused. At common law, the judge looked after the defendant's interests in the absence of counsel. Blackstone declared, "[T]he judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular." BLACKSTONE, *supra*, at 355. Judges often conducted cross-examinations for prisoners and saw no reason to insist on defendants doing this for themselves. Beattie, *supra*, at 233.

[66] In due time, the prohibition against defense counsel was relaxed so as to permit counsel to sit with the accused at trial, but not to speak in open court, such as by questioning witnesses, making objections, arguing motions, or presenting opening statements or closing arguments. Later, the prohibition against counsel's participation was further relaxed by degrees, until it became almost obsolete by 1895. Winthrop characterized the rule prohibiting the participation of defense counsel in courts-martial as "embarrassing, if not indeed humiliating." WINTHROP, *supra* note 2, at 166-67. By 1895, the rule was mostly either ignored or relaxed, as defense counsel were frequently permitted to participate in courts-martial without objection by the court members, except in the rarest of cases.

[67] The Supreme Court did not apply the Sixth Amendment right to counsel to the states through the 14th Amendment until 1932 in capital cases, until 1963 in felony cases, and until 1972 for imprisonable misdemeanors. *See* Powell v. Alabama, 287 U.S. 85 (1932); Gideon v. Wainwright, 372 U.S. 375 (1963); Argesinger v. Hamlin, 407 U.S. 25 (1972).

[68] AW 36 of 1775; AW, § 14, art. 7 of 1776; AW 11 of 1786; AW 75 of 1806; AW 94 of 1874. The Articles of War permitted the trial to go beyond these prescribed hours when the nature of the case, "in the opinion of the officer appointing the court, require[d] immediate example." *Id.* By contrast, a naval court-martial could be held at any hour of the day, but was not supposed to be held at unusual hours or for an unusually

to keep the trial from becoming too protracted or onerous for others to attend, and also afforded the judge advocate an opportunity to compile the daily report of the proceedings.[69]

Ordinarily, neither side made an opening statement, except in complicated cases.[70] Witnesses took an oath to tell "the truth, the whole truth, and nothing but the truth, so help me God."[71] The judge advocate conducted the direct examination, the accused conducted cross-examination, and the court members then asked any questions they had. Witnesses were not permitted to listen to the testimony of other witnesses, except for experts and victims who had already testified.[72] The victim of an offense—also known as the prosecuting witness—was allowed to remain in court after testifying to enable the judge advocate to confer with the prosecuting witness during trial. The prosecuting witness's counsel, if any, was also allowed to sit with the prosecuting witness, but took no active part in the proceedings.[73]

The court members conducted all of their business, to include evidentiary and procedural rulings, by majority vote.[74] Like common law courts, the court members by majority vote were authorized to punish refusals by witnesses to testify, contempt of court, and other disturbances.[75] In non-capital cases, the court members also considered evidence in the form of depositions.[76]

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protracted duration, except when the convening authority informed the court that the case was of extraordinary urgency. NAVAL COURTS AND BOARDS, *supra* note 46, at § 367.

[69] WINTHROP, *supra* note 2, at 281. The judge advocate was responsible for compiling the record of the proceedings of the court-martial referenced in the Articles of War. *See, e.g.*, AW 104, 110-114 of 1874. Every record began with copies of the convening order and a statement regarding the each meeting of the court-martial, and the persons who were present—to include the judge advocate and the accused. WINTHROP, *supra* note 2, at 505. The record set forth fully the testimony of each witness, in the form of separate answers to specific questions, with the answers written down as nearly as practicable in the exact words as they were delivered by the witness. *Id.* at 509. If a considerable amount of testimony was taken down in shorthand, the record had to show that it was read over to the witness to ensure it was correctly transcribed. *Id.* at 510. At the conclusion of the court-martial, the proceedings were *authenticated* as a true and complete record by the signatures of the court president and the judge advocate. *Id*. at 512.

[70] WINTHROP, *supra* note 2, at 283.

[71] AW 54 of 1775; AW §14, art. 6 of 1776; AW 9 of 1786; AW 73 of 1806; AW 92 of 1874.

[72] WINTHROP, *supra* note 2, at 284.

[73] *Id*. at 191. The Articles of War, however, did not recognize the prosecuting witness as having any official role in the prosecution of the charge. There were no private prosecutors in courts-martial.

[74] *Id.* at 171.

[75] AW 54 of 1775; AW, §14, art. 14 of 1776; AW 76 of 1806; AW 86 of 1874.

[76] AW 10 of 1786; AW 74 of 1806; AW 91 of 1874.

Although the court members were supposed to follow the rules of evidence as recognized by the criminal courts of the country, in practice they took a more liberal course in regard to the admission of testimony and the examination of witnesses, and considered whatever evidence they determined was relevant and reliable.[77] The members often asked the judge advocate to produce other witnesses or evidence as needed.[78] Evidence of the accused's good general character was always admissible as a defense as well as in mitigation.[79] When it came time for closing arguments, the accused spoke first, and the judge advocate spoke last.[80] Although the Articles of War were silent as to the burden of proof, the practice was for the prosecution to establish guilt beyond a reasonable doubt.[81]

7. Deliberation and Voting

The judge advocate joined the court members during deliberation as a non-voting member to provide advice, and to call attention to formal errors regarding the preparation of the verdict.[82] Because the judge advocate was with the court members when they deliberated and voted, the judge advocate took an oath not to discover or to disclose the vote or opinion of any court member, unless required to do so in due course of law.[83]

The court members arrived at their findings and sentence by majority vote,[84] except that a death sentence required a two-thirds vote.[85] The court members cast their votes beginning with the most junior in rank.[86] This procedure was meant to prevent the more senior ranking persons from unduly influencing the vote of the junior ranking officers.[87] In

[77] WINTHROP, *supra* note 2, at 313-14.

[78] *Id.* at 286-87.

[79] *Id.* at 350-51.

[80] *Id.* at 299.

[81] *Id*. at 314-15. Naval courts-martial also employed the beyond a reasonable doubt standard. NAVAL COURTS AND BOARDS, *supra* note 46, at §§ 157-59.

[82] WINTHROP, *supra* note 2, at 195.

[83] AW, § 14, art. 3 of 1776, § 14, art. 3; AW 6 of 1786; AW 69 of 1806; AW 85 of 1874. In 1892, Congress passed an Act requiring the judge advocate to withdraw from the court-martial during deliberations. Since then the judge advocate has delivered his advice in open court. WINTHROP, *supra* note 2, at 195.

[84] WINTHROP, *supra* note 2, at 172. Navy courts-martial arrived at their findings and sentence by a majority vote. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 19.

[85] AW, § 14, art. 5 of 1776; AW 8 of 1786; AW 87 of 1806; AW 96 of 1874. Navy courts-martial imposed a death sentence by a two-thirds vote. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 19.

[86] AW, § 14, art. 4 of 1776; AW 7 of 1786; AW 72 of 1806; AW 95 of 1874; *accord* NAVAL COURTS AND BOARDS, *supra* note 46, at § 371.

[87] WINTHROP, *supra* note 2 at 176.

addition, court members—individually or with other court members—could recommend clemency to the commanding officer who convened the court-martial.[88]

The court-martial arrived at a single sentence covering all charges upon which the accused was found guilty, without regard to any differences among the offenses as to the maximum authorized punishment.[89] The commanding officer who convened the court had to approve the findings and sentence before they could be announced. The court members were required by oath not to divulge the sentence of the court until it was approved and published by the proper authority.[90]

E. Review of Courts-Martial during the foundational period

1. Commanding Officer Review

During the foundational era, the primary responsibility for review rested with the commander who convened the court-martial. The sentence or acquittal by a court-martial was not complete or final without the approval of the commanding officer who convened the court-martial.[91] Without the commanding officer's approval, the result of trial was more in the nature of a recommendation only: it was but the opinion of a body of officers.

The commanding officer who convened the court-martial had a legal duty to personally review and act on the case, exercising personal judgment as if the commanding officer were one of the court-martial members.[92] The action was judicial in nature, involving the exercise of discretion to act according to the commanding officer's own judgment in light of the facts and law as understood by the commander, with no obligation to give a reason for the action. The commanding officer was not at liberty to delegate this duty to another.[93] A commanding officer who disagreed with an acquittal could ask the court members to reconsider their finding.[94] In the event of a disagreement with a conviction, the

[88] *Id*. at 443.

[89] *Id*. at 404.

[90] AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 85 of 1874. Keeping the verdict from coming to the knowledge of the accused helped to guard against escapes and facilitated the efficient administration of the punishment. WINTHROP, *supra* note 2, at 234.

[91] AW, § 14, arts. 8, 10 of 1776; AW 2 of 1786; AW 65 of 1806; AW 104 & 109 of 1874. In the Civil War, sentences imposed by a field-officer had to be approved by the brigade commander or higher authority. AW 110 of 1874.

[92] *See* Runkle v. United States, 122 U.S. 543 (1887) (reinstating an officer whose sentence to a dismissal had not been personally approved by the President); WINTHROP, *supra* note 2, at 447.

[93] WINTHROP, *supra* note 2, at 449.

[94] *Id*. at 260 n.65 (reporting cases in which the commander's disapproval of the acquittal rendered the finding inoperative). A British judge advocate in 1847 defended the British military commanders' practice of asking the court-martial to reconsider acquittals or to increase the sentence. MAJOR GENERAL VANS KENNEDY, A TREATISE ON THE PRINCIPLES AND PRACTICE OF MILITARY LAW 214-15 (rev. ed. 1847) ("This revision is obviously founded upon the long established practice of Courts of Law, where it is competent for the judge to direct the jury to reconsider their verdict. For Chitty states 'If the jury through mistake, or evident partiality, deliver an

commanding officer could set it aside. A commanding officer who viewed the sentence as too severe could reduce it, except with respect to a sentence to death or dismissal.[95] If the commanding officer viewed the sentence as not sufficiently severe, the case could be returned to the court-martial for an upward revision.[96] Once approved, the president of the court-martial announced the verdict, and the members of the court spoke with one voice, regardless of the actual vote. If a death sentence was announced, the court-martial stated that two-thirds of the court concurred in the sentence.[97] No dissents were revealed, and no majority or minority vote was disclosed, or even whether the vote was unanimous, because that would violate the members' oath by identifying how members voted.[98]

The judge advocate assigned to the court-martial was required to transmit the original proceedings and approved sentence to the Secretary of War for retention.[99] Upon request, the accused was entitled to a copy of the record of trial and sentence.[100]

2. Further Review

In peacetime, all death sentences and all sentences dismissing a commissioned officer required personal confirmation by the President.[101] In wartime, the commanding general

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improper verdict, the court may before it is recorded, desire them to reconsider it, and recommend an alteration. . . .' Courts-Martial also, are often too favorably inclined towards the Prisoner, and thus the most frequent grounds, upon which a revision is directed, are either an acquittal contrary to evidence, or the inadequacy or illegality of the punishment awarded.") (internal citation omitted). The 1874 Articles of War stated, however, that "[n]o person shall be tried a second time for the same offense." AW 102 of 1874.

[95] AW, § 18, art. 2 of 1776; AW 89 of 1806; AW 112 of 1874.

[96] *See, e.g.*, Swaim v. United States, 165 U.S. 553 (1897) (holding that the action of the President in twice returning the proceedings of a court-martial urging a more severe sentence was authorized by law). Navy convening authorities enjoyed the same power to return any record for a revision of its findings or sentence. NAVAL COURTS AND BOARDS, *supra* note 46, at § 473.

[97] WINTHROP, *supra* note 2, at 404.

[98] *Id.* at 404. The members' oath prohibited them from disclosing or discovering the vote or opinion of any member of the court-martial. AW, § 14, art. 3 of 1776; AW 6 of 1786; AW 69 of 1806; AW 85 of 1874.

[99] AW, § 18, art. 3 of 1776; AW 24 of 1786; AW 90 of 1806. During the Civil War, Congress directed court-martial records be sent to the Judge Advocate General. AW 113 of 1874.

[100] AW, § 18, art. 3 of 1776; AW 24 of 1786; AW 65 of 1806; AW 114 of 1874.

[101] AW, § 14, arts. 8 & 10 of 1776; AW 65 of 1806; AW 105 & 109 of 1874. Before the Constitution was adopted and a President was elected, these reviews were done by Congress or the Commander in Chief. AW, § 14, arts. 8 & 13 of 1776; AW 2 of 1786. The same was true in the Navy where no death sentence or dismissal of a commissioned or warrant officer could be executed until confirmed by the President of the United States. 1862 ROCKS AND SHOALS, *supra* note 26, at art. 19. All other sentences could be confirmed by the commander of the fleet or approved by the officer ordering the court. *Id.*

in the field could confirm these punishments.[102] The President also had to confirm the results of all trials involving general officers in time of war or peace.[103]

Beyond these reviews, there was no further right of appeal. Once the commanding officer approved the results of trial, the case became final. There was no judicial or appellate review;[104] the military justice system did not have appellate courts. The only other avenue for review was by seeking collateral review in federal court, primarily through writs of habeas corpus or back pay claims.[105] Collateral review during the foundational period focused narrowly on jurisdictional issues, which largely precluded review on the merits of non-jurisdictional claims of error.[106]

3. Execution of the Sentence

The sentence was carried out in a manner designed to make an example of a condemned prisoner, often in great ceremony. If a prisoner was to be shot to death, the commanding officer had all available troops assemble in formation on three sides of a square. The prisoner was then paraded in front of them, accompanied by the provost marshal, the regimental band (playing a funeral march), the firing squad, and the prisoner's coffin, carried by four men. On arriving at the open space in front of the formation, the music ceased; the prisoner was placed on the fatal spot marked by his coffin; and the charge, finding and sentence of the court-martial, and the order for his execution, were read aloud. The firing squad formed six or eight paces from the prisoner. After the chaplain said a final prayer and the provost marshal gave the signal, the prisoner was shot to death. The assembled troops were then marched in slow time and in single file by the body of the deceased before returning to their quarters.[107]

Soldiers sentenced to a discharge were literally "drummed out" of the service. The man about to be discharged was brought forward escorted by a guard before the assembled troops where his crimes, misdeeds, and the order for his discharge were read aloud. After stripping the buttons, facings, and any other insignia from his clothing, he was escorted out

[102] AW 65 of 1806; AW 99, 106-07 of 1874.

[103] AW 2 of 1786; AW 65 of 1806; AW 108 of 1874.

[104] WINTHROP, *supra* note 2, at 51.

[105] *See* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 20-36 (1985).

[106] Rosen observes that the jurisdictional approach during this period limited review to four categories of issues: (1) whether the court-martial had jurisdiction over the offense; (2) whether the court-martial had jurisdiction over the person; (3) whether the court-martial was lawfully convened and constituted; and (4) whether the adjudged sentence was duly approved and authorized by law. *Id.* at 31-36.

[107] S.V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 166-67 (4th ed. 1862). Death by hanging was similar in that the troops to witness the execution were assembled in a square formation with the gallows in the center. *Id.* at 167-68.

of the barracks or camp of his corps with drummers and fifes playing the "rogue's march."[108]

In addition, if a commissioned officer was dismissed from the service for cowardice or fraud, the sentence often directed that notices of the crime be published in newspapers to ensure the officer's humiliation before his fellow officers, troops, and associates and family back home.[109] The dismissal action was frequently published in the newspapers circulated near the camp as well as around the officer's residence.[110]

II. The Second Phase: Structural reforms of the World War I era and its aftermath (1913-1941)

The period from the years immediately preceding World War I through the interwar years brought important structural reforms to the military justice system. The World War I era proposals and debates featured the broadest public and congressional attention to military justice since the Revolutionary War era adoption of the Articles of War.

A. The 1913 and 1916 Articles of War

In the years preceding America's entry into World War I, Congress enacted two sets of amendments, which largely reflected the results of a detailed review by Major General Enoch Crowder, the Judge Advocate General of the Army.[111] A set of amendments approved in 1913 included replacement of the garrison and regimental courts-martial with a new forum, the special court-martial, empowered to impose six months confinement.[112] The 1916 amendments retained much of the basic court-martial structure and procedures of the previous articles, while also making a number of changes that have remained part of the military justice system to the present day, including: (1) broad jurisdiction over a wide range of criminal offenses;[113] (2) jurisdiction over certain civilians accompanying the armed forces;[114] (3) appointment of a judge advocate for special as well as general courts-

[108] *Id.* at 168.

[109] AW 22 of 1786; AW 85 of 1806.

[110] NEAGLES, *supra* note 10, at. 32.

[111] Wiener, *supra* note 3, at 16-17.

[112] Act of March 2, 1913, Ch. 93, 62d Cong, 3d Sess., 37 Stat. 721; *see* Crump, *supra* note 4, at 55-58; Wiener, *supra* note 3, at 17.

[113] AW 92 of 1916. The 1916 amendments included jurisdiction over the full range of criminal conduct with the exception of a restriction on peacetime jurisdiction over two offenses: murder and rape. This restriction against trial for murder or rape in times of peace was carried forward in future revisions, to include the 1948 Elston Act, in which no person could be tried for murder or rape committed within the geographical limits of the United States and the District of Columbia in time of peace. AW 92 of 1948, as amended by the Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627 [hereinafter Elston Act]. This restriction remained in place until adoption of the UCMJ in 1950, which provided worldwide jurisdiction over all offenses.

[114] AW 2 of 1916. Under the 1916 amendments, all persons accompanying or serving with the armies of the United States outside of U.S. territory in time of peace were subject to military law; in time of war, such

martial;[115] (4) elimination of the prohibition against regular officers serving as panel members when the accused was a member of the militia or a non-regular volunteer;[116] (5) express recognition of the accused's right to be represented by the counsel of his own selection, if such counsel was reasonably available;[117] (6) a statutory prohibition against compelled self-incrimination;[118] and (7) a speedy trial requirement.[119]

Non-judicial discipline

The 1916 Articles of War provided a new means by which commanders could punish soldiers for minor offenses without having to resort to a court-martial.[120] This new tool was initially called non-judicial discipline, and later came to be known as non-judicial punishment. The tool was available only for "minor offenses not denied by the accused."[121] The authorized punishments included admonition, reprimand, withholding of privileges, extra duty, and restriction to certain specified limits. Forfeiture of pay and confinement,

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persons were subject to military law both within and without the territorial jurisdiction of the United States. Similar bases of jurisdiction were incorporated into the UCMJ when it was enacted in 1950, and remain a part of the Code to the present day. *See* Art. 2 (10-12).

[115] AW 11 of 1916. The judge advocate could issue subpoenas to civilian witnesses in special courts-martial, a power he had in general courts-martial. AW 22 of 1916. Witnesses who refused to appear after receiving a subpoena were subject to prosecution in federal district court for the commission of a misdemeanor. AW 23 of 1916.

[116] AW 4 of 1916.

[117] AW 17 of 1916. If the accused was not represented by counsel, the judge advocate was to advise the accused "from time to time throughout the proceedings . . . of his legal right." *Id.* By comparison, civilian defendants in federal and state courts also had the right to counsel, but only if they could afford counsel. If they could not afford counsel, civilian defendants faced trial without any counsel and without anyone present to record what was said at trial. *See* Wiener, *supra* note 3, at 24.

[118] AW 24 of 1916. This provision was the forerunner to Article 31 of the UCMJ, which is more protective than the Fifth Amendment right against self-incrimination in non-custodial interrogations. *See* Miranda v. Arizona, 384 U.S. 436, 489 n.62 (1966) (referring to Article 31, UCMJ, with approval).

[119] AW 70 of 1916.

[120] AW 104 of 1916. The "captain's mast" was the naval term for the non-judicial proceeding. Unlike the soldier, a sailor could not refuse non-judicial punishment and demand trial by court-martial, or appeal the punishment. These differences are explained by the fundamentally different leadership styles of the two Services. In the Navy, the commanding officer who imposed non-judicial punishment was almost always the commander of a ship in whom the Navy reposed special faith and who was also authorized to convene both deck and summary courts-martial. WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 123 (1973). A similar procedure existed in the Coast Guard, but the Coast Guardsman had a right to appeal the punishment. REGULATIONS FOR THE UNITED STATES COAST GUARD, art. 1924 (1916). In the Army, non-judicial punishment was generally exercised by company commanders, who were often junior officers with much less experience and no authority to convene a court. GENEROUS, *supra*, at 123.

[121] AW 104 of 1916. The 1948 Elston Act later granted the accused the right to decline non-judicial punishment and to demand a court-martial. AW 104 of 1948.

however, were not authorized.[122] The accused also had a right to appeal the punishment imposed by his immediate commander to the next superior officer, if he believed it was unjust or disproportionate to the offense.[123]

Non-judicial punishment was not a bar to a trial by court-martial for the same offense. But if the accused was convicted of the same offense for which he received non-judicial punishment, evidence of this punishment was admissible at the court-martial to mitigate the sentence.[124]

B. World War I and the post-war military justice debates

The 1916 Articles of War were soon put to the test. The United States declared war on Germany in April 1917. Over the next three years, over four million would serve on active duty, including many who had been drafted or enlisted under the pressure of the draft. Few had any prior experience with military justice.

During the War, Major General Crowder was appointed to be in charge of the draft, and Brigadier General Samuel T. Ansell was designated as the Acting Judge Advocate General. Ansell took the position the Judge Advocate General had the authority to revise court-martial sentences for injustice. Crowder disagreed, and the Secretary of the Army sided with Crowder.[125]

Soon after resolving the initial Ansell-Crowder disagreement, the War Department learned that thirteen African-Americans had been executed only two days after being convicted in a mass court-martial in Texas.[126] In the aftermath of public and internal criticism of the proceedings,[127] the War Department published a General Order providing that no death sentences could be executed in the United States until the War Department reviewed the

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[122] AW 104 of 1916. Under the 1948 Elston Act, hard labor without confinement was also authorized, but confinement and forfeiture of pay were not authorized, except when a general court-martial convening authority punished an officer below the rank of brigadier general with a forfeiture of not more than one-half of his pay per month for three months. AW 104 of 1948.

[123] AW 104 of 1916.

[124] *Id*.

[125] For a discussion of the dispute between General Crowder and General Ansell, see Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 MIL. L. REV. 1 (1967); JONATHAN LURIE, ARMING MILITARY JUSTICE 446-126 (1st ed. 1992); Frederick Bernays Wiener, *The Seamy Side of the World War I Court-Martial Controversy,* 123 MIL. L. REV. 109 (1989); Crump, *supra* note 4, at 59-69.

[126] A large racial disturbance involving African-American soldiers resulted in multiple civilian deaths. Sixty-three soldiers were tried in a single court-martial for the disturbance and thirteen were sentenced to death by hanging. The commanding general approved the sentences, and the soldiers were hanged the next day, under the wartime authority of a commanding general to execute sentences in the field without prior approval from high authority. The records of trial were then sent to the Office of the Judge Advocate General for review where four months later they were found to be legally sufficient. Wiener, *supra* note 3, at 17-18.

[127] *Id.* at 17-18; Crump, *supra* note 4, at 5.

case.[128] The end of the war and return of many soldiers to civilian life was accompanied by increased attention to the administration of military justice during the war, including allegations of cases proceeding on the basis of unsupported charges, excessive sentences, improper command interference, and numerous cases returned by the convening authority to the court-martial in an effort to transform acquittals into convictions.[129]

Congress held extensive hearings on the administration of the court-martial system during World War I.[130] It heard reports about a variety of injustices and it invited testimony from many persons of interest, to include Crowder, Ansell, and others. Two main criticisms emerged. The first was that non-lawyers were assigned to defend soldiers.[131] The second was that commanders repeatedly intervened in courts-martial to bring about the results they wanted.[132]

C. The 1920 Articles of War and the interwar implementing rules.

After detailed congressional hearings and public debate,[133] Congress enacted legislation in 1920 that made a number of important changes to the Articles of War.

1. Law Member

The 1920 Articles of War created a new position for the general court-martial. A "law member" was detailed to every general court-martial,[134] even though in practice the court-

[128] General Order No. 169, Dec. 29, 1917 (cited in Wiener, *supra* note 3, at 18).

[129] After the Armistice was signed in 1918, the bulk of U.S. soldiers were discharged from further military duty, and criticisms about the military justice system began to pour in. Wiener, *supra* note 3, at 19-20; Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L. J. 52-54 (1919-20); GENEROUS, *supra* note 120, at 8; *see also The Thing That Is Called Military Justice!*, NEW YORK WORLD, Jan. 19, 1919.

[130] *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Sen. Comm. on Military Affairs*, 66th Cong. (1919); *Courts-Martial: Hearings on Amendments to Articles of War Before a Special Subcomm. of the House Comm. on Military Affairs*, 66th Cong. (1920).

[131] Senate Proceedings and Debates of the 1st Sess. of the 66th Cong., Vol 58, Part 4, 3943 (1919). Senator Chamberlain discussed four death penalty cases from France to illustrate the problem of inexperienced defense counsel. All four soldiers sentenced to death were represented by young second lieutenants with no legal training. Two soldiers were sentenced to death for sleeping on post at the front, but they alleged they had not slept for five days prior to their offense and thus fell asleep from sheer exhaustion. The other two soldiers were sentenced to death for refusing to drill, even though they claimed they were too sick to drill. None of the courts had apparently made any effort to confirm or disprove these extenuating circumstances.

[132] Fully one-third of all acquittals during the war had been changed to guilty verdicts at the request of the convening authority. GENEROUS, *supra* note 120, at 8.

[133] *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Sen. Comm. on Military Affairs,* 66th Cong. (1919); *Courts-Martial: Hearings on Amendments to Articles of War Before a Special Subcomm. of the House Comm. on Military Affairs,* 66th Cong. (1920); *see* Brown, *supra* note 125, at 15-36.

[134] AW 8 of 1920.

martial could proceed in the law member's absence.[135] To qualify, the law member had to be an officer in the Judge Advocate General's office;[136] if such an officer was not available, the appointing officer had to appoint someone specially qualified to perform those duties.[137] The presence of the law member at trial meant that the judge advocate no longer served both as the prosecutor and as the advisor to the court on the law.

The law member was not a judge. The law member served as one of the appointed court members and was seated with them to the immediate left of the presiding court president.[138] As a court member, the law member had an equal vote in deciding all questions submitted to a vote or ballot of the court, including challenges, findings, sentence, and any interlocutory questions submitted to a vote of the court.[139]

Some of the law member's evidentiary rules were binding on the court-martial.[140] But the court members were authorized to overrule or disregard many of the law member's rulings, just as they could reject the advice of the prosecuting judge advocate before there was a law member. The law member's rulings were not binding on matters such as the order of the witnesses or other evidence, the recall of a witness for further examination, the qualifications of expert witnesses, whether the court members would visit the premises where the alleged offense took place, the competence of witnesses, the insanity or other mental defect of the accused, whether argument or statement of counsel was improper, and the correctness of any military action, strategy or tactics.[141] If any court member objected to a law member's ruling, the court was cleared and closed to the public, and the court members decided the question by a majority voice vote, beginning with the officer most junior in rank.[142]

In special courts-martial, which had no appointed law member, the court president performed the role of law member by making rulings in open court.[143]

2. Provision of defense counsel

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[135] MCM 1921, ¶ 85a (discussing courses of action when the law member is absent); *see also* Hiatt v. Brown, 339 U.S. 103 (1950) (the availability of an officer of the Judge Advocate General's department to serve as a law officer on a general court-martial was a matter within the sound discretion of the appointing authority).

[136] AW 8 of 1920.

[137] *Id.*

[138] MCM 1921, ¶ 83.

[139] *Id.* at ¶ 89(a).

[140] AW 31 of 1920.

[141] *Id.*; MCM 1921, ¶ 89*a*.

[142] AW 31 of 1920. A secret ballot was used only on the findings. *Id.*

[143] *Id.*

The 1920 Articles of War required the convening authority to appoint a defense counsel at government expense to represent the accused in all general and special courts-martial, but did not require the appointment of a qualified attorney to serve as defense counsel.[144]

3. Charging and Investigation

The 1920 Articles of War permitted any military member—officer or enlisted—to swear charges against a military accused.[145] There was a safeguard against frivolous charges: the person signing the charges had to take an oath to affirm that he either had personal knowledge of the offenses or had the charges investigated, and that the charges were true in fact to the best of his knowledge and belief.[146]

Moreover, before charges could be referred to a general court-martial, the 1920 Articles required a thorough and impartial investigation of the charged offenses.[147] The investigation was conducted by the commanding officer or another officer appointed by him. The investigation examined the form of the charges and the evidence supporting them.[148] The officer investigating the charges heard testimony from witnesses, including those the accused requested.[149] The accused could cross-examine witnesses, and present evidence in defense or mitigation.[150] At the conclusion of the investigation, the officer appointed to investigate the charges forwarded the charges, a summary of the substance of the testimony taken on both sides, and his recommendation as to disposition of the case to the commanding officer.[151]

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[144] AW 11 of 1920. The 1916 Articles of War merely granted the accused the right to be represented by counsel of his own selection, if counsel was reasonably available. Nevertheless, even the new version did not require the appointed defense counsel be a lawyer—and often he did not possess legal training. But the naming of defense counsel in courts-martial was in this limited sense far in advance of anything available in contemporary federal or state courts. The indigent federal defendant in noncapital cases had to wait for a similar benefit another 18 years until the Supreme Court decided *Johnson v. Zerbst*, 304 U.S. 458 (1938), while the indigent defendant in state court was not entitled to court-appointed counsel until the Supreme Court decided *Gideon v. Wainwright*, 373 U.S. 335 (1963).

[145] AW 70 of 1920. The Coast Guard had a similar procedure. When a report of misconduct was received, "the officer receiving the report shall institute a careful investigation into the circumstances on which the complaint is founded. He shall call upon the complainant for a written statement of the case, together with a list of his witnesses, mentioning where they may be found, and a recommendation of any documentary evidence bearing upon the case that may be obtainable." REGULATIONS FOR THE UNITED STATES COAST GUARD, art. 1922 (1916).

[146] AW 70 of 1920.

[147] *Id*.

[148] MCM 1921, ¶ 76a.

[149] AW 70 of 1920.

[150] *Id*. The 1948 Elston Act later extended the right to counsel to the preliminary investigation. AW 46(b) of 1948.

[151] AW 70 of 1920.

4. Voting

The 1920 Articles of War increased the percentage of the vote needed to reach a conviction and determine the sentence. The new Articles also changed the voting procedure used in arriving at the verdict. Before 1920, only a majority vote was needed for a non-capital offense and a two-thirds vote for a capital one. Under the new law, a two-thirds vote was required to convict in all non-capital cases, and a unanimous vote to convict in capital cases.[152] Before 1920, all sentences in non-capital cases required only a majority vote; the new law required that every sentence have a minimum two-thirds concurrence.[153] If the sentence to confinement was for life imprisonment or for more than ten years confinement, the vote had to be by a three-fourths concurrence.[154]

The 1920 Articles of War also changed the procedure for voting on findings and the sentence: the court members voted by secret written ballot.[155] The junior member counted the votes and the court president checked the count.[156] The court members decided all other interlocutory matters by a simple majority on a voice vote.[157]

The same voting procedure used for findings and the sentence was also used in deciding whether to excuse or "challenge" a member for cause at the start of the trial.[158] The 1920 Articles granted the prosecuting judge advocate a right to challenge court members for cause; and, in addition to challenges for cause, the Articles granted both the prosecutor and the defense counsel the right to exercise one peremptory challenge, which allowed both to remove a member for any reason or no reason at all.[159] The law member was also subject to challenge, but only for cause.[160]

5. Acquittal

Before 1920, the commanding officer could return the record of trial to the court-martial with a request for a different verdict or a more severe sentence.[161] In the period between 1917 and 1919, one-third of all acquittals were turned into convictions at the request of the

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[152] AW 43 of 1920.

[153] *Id.*

[154] *Id.*

[155] AW 31 of 1920.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] Wiener, *supra* note 3, at 20-21.

convening authority.[162] The 1920 revision prohibited the convening authority from revisiting an acquittal or from seeking an increase in the sentence originally imposed, unless the sentence was less than the mandatory sentence fixed by law for the offense.[163]

Until 1920, the findings and sentence were not announced until the convening authority finally approved them. Under the new Articles of War, whenever the court acquitted the accused on all charges and specifications, the court-martial was required to immediately announce this result in open court, since the commanding officer could no longer revisit the acquittal.[164]

6. Post-Trial and Appellate Review

The 1920 Articles improved upon the procedures for post-trial review provided by the general orders published in the aftermath of the Houston riot cases. Previously, the War Department reviewed all cases with a death sentence, a dismissal, or a dishonorable discharge. The new procedures also extended War Department review to cases where the sentence included imprisonment for more than one year or a bad-conduct discharge. The new review procedures were both automatic and at public expense.[165]

The review procedures were integrated into the post-trial actions taken by the reviewing authorities. No sentence could be approved, confirmed, or executed until all reviewing authorities had obtained a written legal opinion from their staff judge advocate.[166] The convening authority could approve and execute low level sentences, meaning those where less than a year of confinement and no discharge had been imposed. Higher reviewing authorities in the chain of command had to confirm other sentences, and the adjudged sentence determined the designation of the final confirming authority.

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[162] GENEROUS, *supra* note 120, at 8.

[163] AW 40 of 1920.

[164] AW 29 of 1920.

[165] AW 50 ½ of 1920. To facilitate these reviews, the 1920 law continued a provision in effect since 1776, which conferred on every accused tried by a general court-martial the right to receive a copy of the record of his trial at no cost. AW, § 18, art. 3(3) of 1776; AW 90(2) of 1806; AW 114 of 1874; AW 111 of 1916. The criminal defendant in federal court had no similar right until 1944. Wiener, *supra* note 3, at 25 n.156, (citing Act of Jan. 20, 1944, ch. 3, 58 Stat. 5, art. 3 (1944), enacted after the decision in *Miller v. United States*, 317 U.S. 192 (1942)); *see* H.R. REP. NO. 78-868, (1943). The position of a state criminal defendant was not clarified until 1956. Wiener, *supra* note 3, at 25 n.157, (citing Griffin v. Illinois, 351 U.S. 12 (1956) (defendant may not be denied the right to appeal by inability to pay for a trial transcript); Eskridge v. Washington State Board of Prison, 357 U.S. 214 (1958) (destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts)).

[166] AW 46 of 1920. William F. Fratcher, *Appellate Review in American Military Law,* 14 MO. L. REV. 15, 44 (1949). The trial judge advocate and defense counsel were both precluded from subsequently acting as staff judge advocate to the reviewing or confirming authority in the same case. AW 11 of 1920.

The President of the United States confirmed any sentence that included the death penalty, the dismissal of an officer, or concerned a general officer.[167] There were three war-time exceptions permitting the commanding general in the field to confirm such a sentence: (1) if the dismissal was not for a general officer;[168] (2) if the commanding general had, as part of his review, reduced the sentence so that it no longer needed to be confirmed by the President;[169] or (3) when a death sentence for murder, rape, mutiny, desertion, and spying, and the record of trial had been examined under the provisions of Article 50 ½, discussed next.

Article 50 ½ required the Judge Advocate General to establish a board of review consisting of at least three officers from his department.[170] The board of review was to examine and prepare a written legal opinion for every case needing the President's approval or confirmation.[171] Except in cases based solely on a guilty plea, neither the President nor the commanding general in the field could order the execution of a sentence to death, a dismissal (not suspended), a dishonorable discharge (not suspended), or to confinement in a penitentiary, until the board of review determined that the record of trial was legally sufficient to support the sentence.[172]

The opinion of the board of review and the recommendation of the Judge Advocate General were advisory only. When the Judge Advocate General ruled, with the concurrence of the Secretary of War, that a case was not legally sufficient, it would not be submitted to the President, and would instead be returned to the convening authority for a rehearing or other appropriate action.[173] But, if the Judge Advocate General disagreed with the board's opinion, then the Judge Advocate General had to forward the entire case, along with the

[167] AW 48 of 1920.

[168] *Id*.

[169] AW 50 of 1920. Fratcher, *supra* note 166, at 46.

[170] AW 50 ½ of 1920.

[171] *Id*.

[172] *Id*; Fratcher, *supra* note 166, at 47. This article contained an exception carried forward from the 1917 code in which a record of trial could bypass post-trial review. When a sentence to a dismissal or a dishonorable discharge was ordered suspended, the board of review did not examine the record of trial under Article of War 50 ½, even if the reviewing authority shortly thereafter revoked the suspension. Wiener, *supra* note 3, at 28. The World War II era Vanderbilt Committee criticized Article of War 50 ½ for being "almost unintelligible," and asserted that there was "no good reason why cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended." REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 9 (December 13, 1946) [hereinafter VANDERBILT REPORT].

[173] AW 50 ½ of 1920; Fratcher, *supra* note 166, at 47. If the convening authority ordered a rehearing, he had to appoint new members. AW 50 ½ of 1920. The court members at the rehearing could not be the same members who sat on the original court-martial. The rehearing could not revisit any acquittal or finding of not guilty; and no increase in the sentence would be enforced unless the sentence was based on a finding of guilty for an offense that was not considered on the merits in the original proceeding. This provision was carried forward by Article 52 of the Elston Act (discussed in Part III.B, *infra*).

board's opinion and his own dissent, to the President.[174] The President could then decide whether to confirm the sentence or to remit, mitigate, commute, or disapprove all or part of the sentence.[175]

The Judge Advocate General's office also reviewed all other records of trial from general courts-martial. If the review determined a record of trial was legally insufficient, the case was forwarded to the board of review. If the board agreed that the record was legally insufficient, the Judge Advocate General forwarded the record, along with the board's opinion and his own opinion, to the Secretary of War or the President for action.[176]

III. The Third Phase: The UCMJ: Prelude, Enactment, Implementation, and Revision (1941-present)

A. Military Justice in World War II - volume and controversy

In World War II, the United States expanded its armed forces to a maximum strength of 12,300,000,[177] and more than 16,000,000 individuals served in the Army over the course of the war.[178] The Navy expanded from 250,000 personnel in peacetime to an aggregate of more than 4,750,000 individuals, including the Marine Corps and the Coast Guard.[179] Six hundred thousand courts-martial were held per year at the height of World War II.[180] The military conducted over 1.7 million trials by the end of the war, carried out over 100 capital executions, and held over 45,000 members of the armed forces in prison, even at the end of the war.[181] The Navy conducted over 600,000 courts-martial during the war, and, at the

[174] AW 50 ½ of 1920.

[175] *Id.*; Fratcher, *supra* note 166, at 49-50.

[176] AW 50 ½ of 1920; Fratcher, *supra* note 166, at 51.

[177] Wiener, *supra* note 9, at 11.

[178] John T. Willis, *The United States Court of Military Appeals: its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972).

[179] ROBERT J. WHITE, A STUDY OF FIVE HUNDRED NAVAL PRISONERS AND NAVAL JUSTICE 1 (1947). The Coast Guard itself grew from a pre-war strength of 17,022 to a total of approximately 241,000 members. Robert Scheina, The Coast Guard at War: A History, *available at* http://www.uscg.mil/history/articles/h_CGatwar.asp.

[180] Robert J. White, *The Uniform Code of Military Justice – Its Promise and Performance*, 35 ST. JOHN'S LAW REV. 197, 200 (1961).

[181] *Id.* at 200 n.4 (1961) (citing Austin H. MacCormick, *Statistical Study of 24,000 Military Prisoners*, 10 FED. PROBATION 6 (1946); Delmar Karlen & Louis H. Papper, *The Scope of Military Justice*, 43 J. CRIM. L., C. & P.S. 285 (1952)); WHITE, *supra* note 179, at 2; LURIE, *supra* note 125, at 128 (1992). During the war, the military conducted a total of 80,000 general courts-martial, or an average of nearly 60 convictions by the highest form of military court, somewhere in the world, every day of the war. GENEROUS, *supra* note 120, at 14.

beginning of 1946, held approximately 15,000 naval personnel in confinement.[182] In all, the armed forces handled one third of all criminal cases tried in the nation.[183]

During and immediately after World War II, Congress was flooded with countless complaints about the administration of military justice; in fact, the military justice system attracted the attention of every major bar association in the United States. The chief complaint was that, even under the 1920 Articles of War, courts-martial were wholly lacking in independence and their decisions were dictated in advance of the trial by the commanders who appointed them.[184]

Studies conducted during and after the war by the Army, the Navy, bar associations, and veterans groups identified areas of significant concern, including improper command interference with courts-martial, inadequate representation, inadequate training of court-members in the legal aspects of their duties, and unduly harsh sentences.[185] These concerns were echoed and amplified during post-war military justice hearings.[186]

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[182] WHITE, *supra* note 179, at 2.

[183] Wiener, *supra* note 9, at 11 (citing Karlen & Pepper, *The Scope of Military Justice,* 43 J. CRIM. L., C. & P.S. 285, 297 (1952)). The demographics for crime potential and the prosecution rate matched. According to one study, the military was responsible for about 30 percent of the nation's crime potential, including from the largest crime-producing segment of American society: males between the ages of 17 and 40. GENEROUS, *supra* note 120, at 14. In the Navy, 60 percent of all offenders were between 18 and 21, while sailors coming from homes broken by divorce, drunkenness, death, or desertion accounted for 85 percent of all offenders. WHITE, *supra* note 179, at 2.

[184] *See, e.g., Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 825-26 (1949) (Testimony of Rep. Gerald R. Ford) [hereinafter *Hearings on H.R. 2498*]; White, *supra* note 180, at 209 n.46 (quoting letter from Vermont's post-war Governor Edward W. Gibson to the Committee on the Code, dated Nov. 18, 1948).

[185] Vanderbilt Report, *supra* note 172; Secretary of War, The Complete Doolittle Report: The Report of the Secretary of War's Board on Officer-Enlisted Man Relationships (1946); Press Release, Navy Department, Chaplain Reports on Prisoners' Opinions of Naval Justice (Jan. 5, 1947) (describing White Report, *supra* note 179); Court-Martial Sentence Review Board, Report of General Court -Martial Sentence Review Board to the Sec'y of the Navy (1947).

Secretary of War Robert P. Patterson enlisted the aid of the American Bar Association (ABA) for ideas on how to reform and improve the justice system. In 1946, the ABA appointed a committee of prominent lawyers and judges to hold hearings and make recommendations regarding the military justice system. *Association Aid Enlisted in Improving Army Courts-Martial*, 32 A.B.A. J. NO. 5, 254 (May 1946); *Military Justice: Changes Advised in Courts-Martial*, 33 A.B.A. J. NO. 1, 40 (January 1947). The Secretary of the Navy requested four separate groups to study the Navy court-martial system and make recommendations for its modification. Pasley & Larkin, *supra* note 6, at 195-96.

[186] *Hearings on H.R. 2498*, *supra* note 184; *Hearings on H.R. 3341 and H.R. 4080 before the House Comm. on Armed Services*, 81st Cong. (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. (1949).

B. The 1948 Elston Act

Congress first addressed the issues arising out of the World War II experience through revisions of the Articles of War in 1948 legislation that came to be known as the Elston Act.[187] The legislation included a number of major changes in military practice which were made part of the UCMJ two years later.[188]

The Elston Act was approved during the same time period in which Congress combined the military departments into a single organization, which became the Department of Defense.[189] The Elston Act applied to the Army, not the Navy, and it was not clear initially if the Act applied to the Air Force until a federal appeals court ruled that it did so apply.[190]

James V. Forrestal, the first Secretary of Defense, decided that a single military code should be enacted to apply to all of the armed forces, and appointed a committee to draft the new Code.[191] Based on the committee's report and draft legislation, the Department forwarded to Congress proposed legislation to create a Uniform Code of Military Justice. After extensive hearings and debate, the legislation, as modified by Congress, was signed into law by President Truman on May 5, 1950.[192] It became effective on May 31, 1951, and applied

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[187] Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627. The Elston Act was named for its sponsor, Representative Charles Elston of Ohio, and was enacted as part of the Selective Service Act of 1948.

[188] The Elston Act's major provisions are discussed together with the UCMJ's major provisions below.

[189] In 1947 Congress placed the Army, the Air Force, and the Navy in the newly created National Military Establishment under the control of a Secretary of Defense. Act of June 26, 1947, ch. 343, 61 Stat. 495 [National Security Act of 1947]. The National Military Establishment was renamed the "Department of Defense" on August 10, 1949.

[190] Stock v. Department of the Air Force, 186 F.2d 968, 968 (4th Cir. 1950). When the President signed the Air Force Military Justice Act on June 25, 1948, the statute stated that the Air Force was now governed by the "laws now in effect." The laws in effect then were the 1920 Articles of War, not the Elston Act. The Elston Act, which President Truman signed the day before, on June 24, 1948, would not go into effect until February 1, 1949. GENEROUS, *supra* note 120, at 31-32.

[191] Secretary Forrestal appointed a four-man committee to draft the new code. He chose Harvard law professor and long-time advocate of military justice reform, Edmund M. Morgan, to chair the committee. Professor Morgan was the same professor who nearly 30 years earlier had criticized the 1916 Articles of War in congressional hearings. LURIE, *supra* note 125, at 157-70; Felix Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7, 8-9 (1965). In Professor Morgan's words,

> [T]he committee endeavored to follow the directive of Secretary Forrestal to frame a Code that would be uniform in terms and in operation and that would provide full protection of the rights of person subject to the Code without undue interference with appropriate military discipline and the exercise of appropriate military functions.

Morgan, *supra* note 57, at 22; LURIE, *supra* note 125, at 157-213; GENEROUS, *supra* note 120, at 34-53; Willis, *supra* note 178, at 54-63.

[192] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. For the Congressional hearings on the UCMJ, see *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. (1949); *Hearings on H.R. 3341 and H.R. 4080 before the House Comm. on Armed Services*, 81st Cong. (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*,

to all of the military services—the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.[193]

C. The Uniform Code of Military Justice

The UCMJ retained the core features of military justice, including unique military offenses and punishments, as well as the disciplinary and disposition authority of the commander.[194] The legislation also made major changes in the structure of the military justice system. These changes have been refined in subsequent legislation, as summarized in the following sections.

81st Cong. (1949); H.R. REP. NO. 81-491 (1949); S. REP. NO. 81-486 (1949); H.R. REP. NO. 81-1946 (1950) (Conf. Rep.); 95 CONG. REC. [Feb. 8; April 26; May 5, 13; July 29 (1949); Feb. 1, 2, 3 (1950)].

[193] The Marine Corps is a branch of the Armed Forces separate from the Navy, but is a component of the Department of the Navy. The Coast Guard is also a branch of the Armed Forces. In peacetime it is under the Department of Homeland Security, but in war or exigency it can be transferred to the Department of the Navy. The Coast Guard began as the Revenue-Cutter Service under the Department of the Treasury in 1790, and merged with the U.S. Lifesaving Service to become the modern Coast Guard in 1915. The Service was transferred to the Department of Transportation with its establishment in 1967, and was again transferred to the Department of Homeland Security in 2002.

[194] The UCMJ provided a standard procedure whereby commanding officers could discipline officers and enlisted persons for minor offenses without a court-martial. Article 15, UCMJ (1950). This procedure was not a court-martial and the receipt of punishment was not a conviction. Receiving non-judicial punishment did not bar a later trial by court-martial for the same offense, but the accused had a right to show at the later trial he had previously been punished for the same offense during sentencing. Art. 15(e), UCMJ (1950).

The Code did not provide the military member a right to refuse non-judicial punishment and demand trial by court-martial, as was previously the case under the Articles of War. Instead, service Secretaries could, by regulation, place limitations on the powers granted under the Code. Art. 15(b), UCMJ (1950). The Army and the Air Force published regulations giving their members the right demand a court-martial when offered non-judicial punishment. MCM 1951, ¶ 132. The Navy and the Coast Guard did not afford their members this right.

In 1962, Congress amended the UCMJ to give military members a statutory right to demand trial by court-martial, "except in the case of a member attached to or embarked on a vessel." Act of September 7, 1962, Pub. L. No. 87-648, 76 Stat. 447, 448. (1962). This amendment had the effect of extending to members of the Navy and Coast Guard the right to demand trial by court-martial in lieu of nonjudicial punishment, subject to the "vessel exception." *See* Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL LAW REV. 71 (1996) (explaining the history of the UCMJ's "vessel exception," and noting instances in which sailors were denied the right to demand a court-martial due to the "vessel exception" when the "vessels" in question were in dry dock being overhauled and, thus, not operational).

In receiving non-judicial punishment, commissioned officers and warrant officers could be required to forfeit their pay, have their privileges withheld, and be restricted to certain specified limits. Article 15(a)(1), UCMJ (1950). Enlisted persons could also have their privileges withheld and be restricted to certain specified limits, be given extra duties, be reduced in rank, and, if attached to or embarked on a vessel, confined on bread and water or diminished rations. Article 15(a)(2), UCMJ (1950). The maximum punishment imposable on enlisted persons depended on the rank of the officer imposing the punishment and on the rank of the enlisted persons involved.

1. Court-Martial Jurisdiction

The Elston Act provided that the military had jurisdiction to punish violations of all offenses, except murder or rape committed within the geographical limits of the United States and the District of Columbia in time of peace.[195] Under the UCMJ, court-martial jurisdiction extended to all offenses over all persons subject to the Code at all times and in all places.[196] The category of persons subject to the Code covered not only servicemembers on active duty, but also family members and civilian employees and contractors accompanying the armed forces overseas; the UCMJ also purported to retain jurisdiction over former servicemembers who had committed serious offenses while on active duty and who could not be tried in federal or state court for those offenses.[197]

In the 1950s, the Supreme Court invalidated the portions of the UCMJ authorizing trial by court-martial of military dependents and civilian employees accompanying the armed forces overseas in time of peace.[198] The Court also held that ex-servicemen were no longer subject to military jurisdiction for offenses they may have committed while on active duty.[199]

In 1969, the Supreme Court also placed a major limitation on the trial of servicemembers for some offenses committed under the UCMJ. In *O'Callahan v. Parker*, the Court ruled that military jurisdiction extended only to offenses with a "service-connection" to the military; in the absence of a "service-connection," civilian courts had to try the offenses so the defendant would receive the full protections of the Bill of Rights, in particular, a grand jury indictment under the Fifth Amendment and a trial by jury under the Sixth Amendment.[200]

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[195] The 1948 Elston Act provided that no person could be tried for murder or rape committed within the geographical limits of the United States and the District of Columbia in time of peace. AW 92 of 1948.

[196] Article 2 (Persons subject to the code) & Article 5 (Territorial applicability of the code), UCMJ (1950).

[197] *See, e.g.*, Article 3(a), UCMJ (1950) (Jurisdiction to try certain personnel) (defining a serious offense committed by a former servicemember as punishable by confinement for 5 years or more).

[198] McElroy v. United States *ex rel*. Guagliardo, 361 U.S. 281 (1960) (civilian government employees); Reid v. Covert, 354 U.S. 1 (1957) (civilian dependents); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (civilian dependents). In light of these cases, the U.S. Court of Military Appeals declined to sustain military jurisdiction over civilian employees of Army contractors in Vietnam, because Congress had not declared war in the armed conflict. *See, e.g.*, United States v. Averette, 41 C.M.R. 363 (1970) (no UCMJ jurisdiction over civilian employee of Army contractor in Vietnam, interpreting the jurisdictional provision as applying only in time of a declared war), superseded by statute Article 2(a)(10), UCMJ (1950), as stated in United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012)); *see also* MAJ. GEN. GEORGE S. PRUGH, LAW AT WAR 110 (1991).

[199] *See, e.g.,* Toth v. Quarles, 350 U.S. 11 (1950) (no UCMJ jurisdiction over ex-servicemembers).

[200] O'Callahan v. Parker, 395 U.S. 258 (1969). In *O'Callahan*, the Court determined that an off-duty soldier's attempted rape and assault of a civilian in a Honolulu hotel had no service-connection since the offenses were committed in peacetime, in U.S. territory, and did not involve military authority, security, or property.

By one estimate, the service-connection rule resulted in civilian courts handling roughly two out of every five serious offenses by soldiers.[201] In 1987, the Supreme Court overruled *O'Callahan* and ended the service-connection requirement.[202] Today, court-martial jurisdiction is based solely on the accused's status as a member of the armed forces.

2. Pretrial Investigation/Preliminary Hearing

The UCMJ carried forward the requirement that no charge could be referred to a general court-martial until a thorough and impartial investigation had been made of all matters set forth in the charges.[203] From 1920 to 2014, the purpose of this pretrial investigation was to inquire into the truth of the matters set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case "in the interest of justice and discipline."[204]

The accused had the right to be present at the investigation, to be represented by counsel, and to have a "full opportunity" to cross-examine witnesses against him.[205] The accused also had the right to present anything he desired in his own behalf, either in defense or mitigation, and to have the investigating officer examine available witnesses requested by the accused.[206]

In 2013, Congress changed the pretrial investigation into a preliminary hearing.[207] The hearing's purpose now is to determine whether there is probable cause to believe an offense has been committed and that the accused committed the offense. Victims are not required to appear at the hearing, and cross-examination of witnesses, if any, is limited to

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[201] General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat,* 3 HARV. J. L. & PUB. POL'Y 1, 86, 87 n.51 (1980). The service-connection rule led to some odd results. *See, e.g.*, United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976) (upholding jurisdiction for a conspiracy offense, since military members had formed an agreement on a military base to go into town to rob someone for beer money; but rejecting jurisdiction over the subsequent robbery and kidnapping offenses committed downtown in furtherance of the conspiracy).

[202] Solorio v. United States, 483 U.S. 1056 (1987) (upholding jurisdiction over numerous sex offenses involving minor female dependents of fellow servicemembers at private residence).

[203] Article 32, UCMJ (1950).

[204] Article 32(a) (1950-2013).

[205] *Id.* Under the Elston Act, Congress expressly granted the accused the right to be represented by counsel at the investigation. AW 46(b) of 1948 ("The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command . . . ."). The Navy published regulations requiring a pretrial inquiry by the officer recommending court-martial; the officer could order a board of investigation or court of inquiry if needed. *See* Synopsis of Recommendations for the Improvement of Naval Justice, Office of the Judge Advocate General, Navy Department, 1947.

[206] *Id*.

[207] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013).

matters directly relevant to the hearing.[208] The hearing's other objectives remain the same: whether the convening authority has court-martial jurisdiction over the offense and the accused, the form of the charges, and a recommendation as to the disposition that should be made of the case.[209]

3. Types of Courts-Martial (including panel membership)

The UCMJ maintained the same three basic types of court-martial available since 1916: the general court-martial, the special court-martial, and the summary court-martial.[210] The general court-martial required the appointment of at least five court members.[211] The senior member was the court president who presided at the court-martial, and who retained a few important duties, such as setting the time and place of trial, prescribing the uniform required in court, and preserving order in the open sessions of the court to ensure they were conducted in a dignified, military manner.[212] Both the Elston Act and the UCMJ provided that enlisted persons were now competent to sit on all general and special courts-martial when the accused was enlisted.[213]

The general court-martial could impose any authorized punishment, including the death penalty.[214] A unanimous vote of the court members was required to convict on an offense for which the death penalty was mandatory or discretionary.[215] A sentence of life imprisonment or confinement for more than ten years needed a three-fourths concurrence.[216] In both general and special courts-martial, all other findings of guilty and sentences required a two-thirds vote of the members.[217] Questions, such as a challenge for

[208] Art. 32(d), UCMJ (2014).

[209] *Id.* Congress later clarified that the accused, as under prior law, could waive the new Article 32 preliminary hearing. NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat 3292 (2014).

[210] Art. 16, UCMJ (1950).

[211] The Elston Act continued to require the appointment of a law member; the UCMJ replaced the law member with a *law officer*, as discussed in the next section 4, *infra*.

[212] MCM 1951, ¶¶ 41, 57, 73, 74.

[213] AW 4 of 1948; Art. 25(c), UCMJ (1950). The accused could request the appointment of enlisted members in writing, and at least one third of the total membership on the court had to consist of enlisted persons. But the pool of enlisted persons who could serve as court members excluded enlisted person in the same military unit as the accused.

[214] Art. 18, UCMJ (1950).

[215] Art. 52, UCMJ (1950). Only a two-thirds vote was required to convict on an offense where death was discretionary. However, a unanimous vote was required for a sentence of death.

[216] Art. 52(b)(2), UCMJ (1950).

[217] Art. 52(a)(2) UCMJ (1950).

cause, a motion for a finding of not guilty, or a motion relating to the accused's sanity, were decided by a majority vote of the court members.[218]

The special court-martial required at least three members (no law officer was required),[219] and could adjudge a bad-conduct discharge, confinement for six months, hard labor without confinement for three months, and forfeiture of two-thirds pay for six months.[220] In 1999, Congress increased the period of confinement and forfeiture that special courts-martial could impose to one year.[221]

The summary court-martial consisted of one officer who could adjudge confinement for one month, hard labor without confinement for 45 days, restriction for two months, and forfeiture of two-thirds pay for one month.[222] The UCMJ retained the right of a servicemember to object to the forum, unless he had previously refused punishment under Article 15, UCMJ.

4. Military Judge (from law member to law officer to military judge)

The Elston Act increased the qualifications of the law member by requiring the law member to be an officer in the Judge Advocate General's department or an officer who was a member of the bar of a Federal court or of the highest court of a state of the United States *and* certified by the Judge Advocate General for such detail.[223] The legislation also enhanced the role of the law member by providing that the law member's evidentiary rulings were final and binding on the court members.[224] The law member, however, did not occupy the position of a judge. The law member continued to serve as a voting member of the panel. The presiding officer at trial was still the court president, and the law member was still seated next to him.

a. The judicial role of the law officer

The UCMJ replaced the law member with a new position—the law officer. The law officer now sat apart from the court members during trial, usually in the front of the courtroom on a raised dais, where a judge would normally preside over a trial.[225] Unlike the law member, the law officer was not one of the court members, did not deliberate or vote with the

[218] Art. 52(b)(3) UCMJ (1950).

[219] Art. 16, UCMJ (1950).

[220] Art. 19 UCMJ (1950).

[221] NDAA FY 2000, Pub. L. No. 106-65, § 577 (October 5, 1999).

[222] Art. 20, UCMJ (1950).

[223] AW 8 of 1948.

[224] AW 31 of 1948. The court president's rulings in special courts-martial on those same questions were similarly final. *Id.*

[225] MCM 1951, ¶ 61*b*; *see also* MCM 1951, at 500 (schematic of seating in general court-martial).

members, and could not discuss the case with the members outside of the presence of the accused (with one limited exception that allowed the law officer to help the members put the findings and sentence into proper form).[226]

Although the law officer was not a judge, the law officer was expected to remain scrupulously impartial,[227] to instruct the court members on all elements of the offense or lesser-included offenses fairly raised by the evidence,[228] to avoid unauthorized out-of-court discussions about the case,[229] and to abstain from improperly entering the closed sessions of the court members.[230] In special courts-martial, the court president was expected to perform the same duties the law officer performed at a general court-martial.[231]

As the law officer was meant to be more like a judge, it was also evident that the court president of a general court-martial was meant to occupy a position more like the foreman of a jury. Except for the court president's right as a member to object to certain rulings of the law officer, the president was not to interfere with those rulings.[232]

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[226] The law officer still lacked the authority to rule on challenges, motions for a finding of not guilty, or the accused's sanity. These issues continued to be decided by the court members. Art. 41, UCMJ (1950); *see also* JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 96-97, 396, 402 (1953). The law officer made evidentiary and procedural rulings, and instructed the court members on the elements of the offense, the presumption of innocence, and the burden of proof. Art. 51(c), UCMJ (1950). The duties of the law officer were not entirely spelled out in the UCMJ. These details were left for the President, who was responsible to prescribe the rules of procedure and evidence in the Manual for Court-Martial. Art. 36, UCMJ (1950); *see also* GENEROUS, *supra* note 120, at 43. For example, the law officer's responsibility to instruct on the elements of the offense was provided in paragraph 73 of the 1951 Manual for Courts-Martial.

[227] United States v. Renton, 25 C.M.R. 201 (C.M.A. 1958) (law officer should have disqualified himself after helping the prosecution draft the sample charges and specifications against the accused); *see also* United States v. Kennedy, 24 C.M.R. 61 (C.M.A. 1957) (law officer abandoned his impartial role and became an interested party for the government, when he admitted that subjective influences were working on him, including an appreciation of the fact that he had a career in the Army which must be considered).

[228] United States v. Clark, 2 C.M.R. 107 (C.M.A. 1952) (conviction of lesser included offense could not be affirmed when no instruction had been given on the elements of the offenses); United States v. Phillips, 11 C.M.R. 137 (C.M.A. 1953) (law officer improperly denied a request for an instruction on the accused's good character). Since the law officer was responsible to instruct on the law, court members were no longer permitted to bring a copy of the Manual for Courts-Martial for use in closed session deliberations. Court members could no more refer to the Manual than they could to other legal authorities in their closed-session deliberations. United States v. Boswell, 23 C.M.R. 369 (C.M.A. 1957).

[229] United States v. Kennedy, 24 C.M.R. 61 (C.M.A. 1957).

[230] United States v. Keith, 4 C.M.R. 85 (C.M.A. 1952).

[231] U.S. v. Clay, 1 C.M.R. 74 (C.M.A. 1951) (It was reversible error for the special court-martial president to fail to instruct the other members on the elements of the offense.).

[232] MCM 1951, ¶¶ 41, 57, 73, 74. A natural tension thus arose between the law officer, whose evidentiary rulings and instructions were final, and the court president, who still presided over the court-martial, and was adjusting to a diminished role. The court president was not permitted to make rulings reserved for the law officer. *See* United States v. Berry, 2 C.M.R. 141 (C.M.A. 1952) (reversing the conviction in a pre-UCMJ case, because the court president had made rulings that were for the law member: "The ground for this

Two lingering problems impeded the law officer's independence. In the 1950s, the law officer often performed this duty on a part-time basis. When not engaged in trial work, the law officer's primary job could be any number of tasks performed by military lawyers.[233] More importantly, the law officer was often a judge advocate assigned to work for the staff judge advocate to the commanding officer who convened the court. Because the law officer was a subordinate in the staff judge advocate's office, he knew that the charges at the court-martial had already been approved for trial by the very same officer who wrote his efficiency reports. This arrangement created the potential for unlawful command influence from the office of the staff judge advocate.[234]

In 1957, the Army developed a solution to address the organizational pressures faced by the law officer by creating an independent judiciary—a corps of judge advocates whose only duty would be to sit as law officers on general courts-martial and who would not be under the command of any person who recommended trial, who ordered trial, or who would review the record of trial in any capacity.[235]

Under the program, senior judge advocates were assigned to a normal three-year tour of duty as judicial officers by the Judge Advocate General. Efficiency reports were written by the assistant judge advocate general and endorsed by the Judge Advocate General.

The creation of an independent judiciary had an immediate benefit: in the first year and a half of the new program, reversals for law officer error were cut to less than 50 percent of the previous rate.[236] The actual length of the trial doubled, as a result of the law officer paying more attention to interlocutory rulings and instructions.[237] The law officer would no longer be rushed by pressure from the court president to "get on with it."[238]

b. The judicial role of the military judge

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holding is, not specific prejudice to the accused's rights under the circumstances of this particular case, but rather the general prejudice to his rights arising from a violation of the basic principle of freedom of the court from 'command influence.'").

[233] GENEROUS, *supra* note 120, at 116-17.

[234] Frederick Bernays Wiener, *The Army's Field Judiciary System—A Notable Advance*, 46 A.B.A. J. 1178, 1180 (1960). Both factors—the part-time character of the law officer's work, plus the fact that he was more frequently than not under the shadow of the staff judge advocate—contributed to the high incidence of error ultimately requiring correction. *Id.* at 1180 (citing *Messy Areas in the Administration of Military Justice*, 21 THE JUDGE ADVOCATE JOURNAL 20, 23-24 (Dec, 1955)).

[235] Wiener, *supra* note 234, at 1178.

[236] GENEROUS, *supra* note 120, at 118.

[237] Wiener, *supra* note 234, at 1181.

[238] Many commanders actually welcomed the new plan because reversals for law officer error decreased. Wiener, *supra* note 234, at 1182.

In 1968, Congress replaced the law officer with the military judge, and made the Army's independent field judiciary system mandatory for all five Services.[239] Moreover, for the first time in military history, an accused could elect to be tried and sentenced by a military judge sitting alone—without court members—in both general and special courts-martial.[240] The military judge's new powers also included the power to release an accused from pretrial confinement after referral of the case to court-martial.[241] In addition, before any special court-martial could adjudge a bad-conduct discharge, Congress required the appointment of a military judge and legally trained counsel for both sides.[242] The transformation of law officer into military judge marked the end of a long decisional process by Congress.

5. Counsel

The UCMJ required that any person who was appointed as trial counsel or defense counsel in a general court-martial must be a judge advocate or a graduate of an accredited law school or a member of the bar of a federal court or the highest court of a state, and certified as competent to perform such duties by a judge advocate general.[243] The appointment of counsel with these qualifications was not required in special courts-martial.[244]

In 1968, Congress amended the UCMJ to excuse the appointment of qualified defense counsel on account of physical conditions or military exigencies.[245] In 1983, Congress again

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[239] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; *see* H.R. REP. 90-1481; S. REP. 90-1601.

[240] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. By 1988, about three-quarters of all trials by special and general courts were before a military judge sitting alone without court members *See Military Justice Statistics,* Dep't of the Army, *Clerk of Court Notes*, THE ARMY LAWYER, 27-50-182, 54 (Feb. 1988). The exact figures for judge alone cases in the Army were: GCM, 71.2%; BCDSPCM, 78.4%; SPCM, 65.8%.

[241] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1338, 1341.

[242] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[243] Art. 27, UCMJ (1950). By contrast, Assistant U.S. Attorneys are only required to be members of the bar of a federal court or of the highest court of a state; they do not need to be a law school graduate of an accredited law school. United States Department of Justice, Experienced Attorney Hiring Process, http://www.justice.gov/legal-careers/hiring-process (last visited Mar. 17, 2015). Public defender qualification requirements are similar, requiring any public defender to be "a member in good standing in the bar of the state." U.S. DEP'T OF JUSTICE, U.S. COURT GUIDE TO JUDICIARY POLICY, Vol. 7A, § 420.10.50. Graduation from an accredited law school is not listed as a requirement.

[244] During the Vietnam War, some commanders opposed relinquishing control over special courts-martial, even after lawyers began serving as defense counsel. These commanders accepted that felony-level general courts-martial required judge advocates, but they did not appreciate the intrusion of lawyers into their special courts. For example, the Army division's aviation group and artillery commanders in Vietnam continued using non-lawyers as prosecutors, believing that a line officer, rather than a judge advocate, would better represent the command's interest. FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 33 (US Army, 2001). However, non-lawyer trial counsel did not perform as well as legally trained defense counsel. The most reluctant convening authorities eventually accepted the presence of judge advocates at special courts-martial. By mid-1970, the Army required a military judge in all special courts-martial, not just those that could adjudge a bad-conduct discharge. *Id*.

[245] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(2), 82 Stat. 1335.

amended the UCMJ to state that qualified defense counsel must be appointed in all special courts-martial, except on account of physical conditions or military exigencies.[246]

Defense counsel faced the same circumstances law officers faced before development of the field judiciary program. Defense counsel were members of the same legal office as prosecutors and were under the supervision and control of the staff judge advocate who advised the commander.

In 1973, the Secretary of Defense directed each of the military departments to submit plans for restructuring its defense counsel services.[247] In 1974, the Air Force and the Navy placed its defense counsel under the direction of the appropriate judge advocate general, with the Army following suit in 1978.[248]

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[246] Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c)(2), 97 Stat. 1393, 1394.

[247] The Vietnam War exposed another problem area in the military: racial tension and unrest. In 1972, Secretary of Defense Melvin R. Laird commissioned a task force "to identify and assess the impact of racially related patterns or practices on the administration of justice" and "to recommend ways to strengthen the military justice system and to enhance the opportunity for equal justice for every serviceman and woman." John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 21 (1983) (citing 1 DEP'T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES at 1-2 (Nov. 30, 1972) [hereinafter ADMINISTRATION OF MILITARY JUSTICE TASK FORCE NOV. 1972 REPORT]; W.M. Burch, II, *From Military Justice Branch to Directorate: USAF Judiciary*, XV, No. 1 JAG L. REV. 45, 48 (1973). The Task Force was co-chaired by Mr. Nathaniel Jones, General Counsel for the National Association for the Advancement of Colored People, and Lieutenant General C.E. Hutchin, Jr., Commander, First Army. Lynn G. Norton, *Air Force Leads Way: Pioneering the Defense Program*, 26 THE REPORTER 106 (1999).

The Task Force found that African-American troops, who rarely saw members of their own race in command positions, had lost confidence in the military as an institution; they saw the command structure as having no regard for whether they would succeed in military careers. ADMINISTRATION OF MILITARY JUSTICE TASK FORCE NOV. 1972 REPORT, *supra*, at 38-48, 59-66. The Task Force also found that many enlisted men lacked confidence in military defense counsel and did not believe that defense counsel truly represented their interests. Instead they believed that defense counsel could not effectively represent the accused because they also served the commander. Howell, *supra*, at 21. To address this concern, the Task Force recommended that all defense counsel be brought under the direction of the Judge Advocate General. Howell, *supra*, at 22; Norton, *supra*, at 26.

[248] In the Air Force, defense counsel were called area defense counsel and were initially assigned to the Trial Judiciary Division. Norton, *supra* note 247, at 26. The Navy already had its defense and trial counsel in law centers as early as 1968. To separate the defense function from the command bringing charges, the Navy placed the centers under the Navy Judge Advocate General in 1974. U.S. COMPTROLLER GENERAL, REPORT TO CONGRESS: FUNDAMENTAL CHANGES NEEDED TO IMPROVE THE INDEPENDENCE AND EFFICIENCY OF THE MILITARY JUSTICE SYSTEM, FPCD 78-16, at 31 (Oct. 31, 1978). The Coast Guard in 1988 entered into an MOU with the Navy to provide Coast Guard attorneys to assist in certain Navy offices; in exchange the Navy provides most Coast Guard defense advocacy services nation-wide. Coast Guard Military Justice Manual, COMDTINST M5819.1E (April 2011), Encl. 24b. The Army created and placed its defense counsel under the Trial Defense Services. Howell, *supra* note 247, at 4.

6. Trial procedure

The UCMJ provided broad authority to the President to prescribe rules for pretrial, trial, and post-trial procedures, including modes of proof.[249] The President prescribes rules which, so far as he considers practicable, apply the principles of law and the rules of evidence generally applicable in United States district court, so long as those rules are not contrary to or inconsistent with other provisions of the UCMJ.[250]

The President publishes the military criminal procedures in the Rules for Courts-Martial, which generally conform to the Federal Rules of Criminal Procedure insofar as practicable.[251] The Rules for Courts-Martial tend to be much more extensive than the Federal Rules of Criminal Procedure as they must provide detailed guidance on matters that are specific to military practice.

In 1950, the admissibility of evidence and the competency and privileges of witnesses in federal courts was governed by common law principles. The rules of evidence in the federal and state criminal system were largely the product of case law. Congress enacted the Federal Rules of Evidence in 1975.[252] The Military Rules of Evidence, adopted in 1980, were identical in many respects to the federal rules.[253] By regulation, any amendment to the federal rules will automatically amend parallel provisions in the Military Rules of Evidence, unless the President takes action to the contrary within eighteen months of the amendment.[254]

With military rules and procedures modeled on federal rules and procedures, courts-martial can look to federal court decisions interpreting those rules and procedures as persuasive authority.[255]

7. Unlawful Command Influence

The Elston Act addressed inappropriate interference in the court-martial trial and review process by identifying and prohibiting acts that could unlawfully influence the actions of court-members and convening authorities.[256]

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[249] Art. 36, UCMJ (1950). This provision was derived from a similar one in the Articles of War. In the Navy, rule-making authority was given to the Secretary of the Navy. *See Hearings on H.R. 2498*, *supra* note 184, at 1014.

[250] *Hearings on H.R. 2498*, *supra* note 184, at 1016-19.

[251] The Federal Rules of Criminal Procedure took effect in 1946, after Congress authorized the Supreme Court to draft them. Sumners Courts Act, 76 Pub. L. No. 675, 54 Stat. 688 (June 29, 1940).

[252] Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[253] MCM, App. 22, (M.R.E. General Provisions, Analysis) (discussing history of the Military Rules of Evidence).

[254] M.R.E. 1102(a).

[255] *See* MCM, App. 22 (M.R.E. General Provisions, Analysis).

The UCMJ similarly addressed "unlawful command influence" by prohibiting convening authorities and commanders from censuring, reprimanding, or admonishing a court member, law officer, or counsel with respect to the findings or sentence of the court, or the exercise of their functions in the conduct of the proceedings.[257] The UCMJ also made such conduct punishable in a punitive article.[258]

8. Post-trial role of the Convening Authority

Under the Elston Act, the convening and the confirming authority (the authority to confirm a sentence) had the implied power to disapprove both the findings of guilty and the sentence, in whole or in part, and to remand the case for rehearing.[259]

Under the UCMJ, the convening authority continued to exercise an appellate-type review function with responsibility to act on the findings and sentence, and was only to approve them to the extent that he found them correct in law and fact, and to the extent he determined in his discretion that they should be approved.[260]

In 1983, Congress removed the requirement for the convening authority to conduct formal appellate reviews of cases to ensure their legal sufficiency before approving the findings and the sentence.[261] The 1983 Act focused the convening authority's attention on matters of direct interest to the exercise of command prerogative—the matter of clemency. For these purposes, the Act also permitted the accused's defense counsel to submit a rebuttal to the staff judge advocate's recommendation before the convening authority took action on the case.

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[256] AW 88 of 1948.

[257] Art. 37, UCMJ (1950).

[258] Art. 98, UCMJ (1950). Since 1951, however, there have been almost no prosecutions of any kind for unlawful command influence under Article 98. Wiener, *supra* note 3, at 41-42 n.244. For a fuller discussion, *see Hearing on Constitutional Rights of Military Personnel Before Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong., 2d Sess., 780-81 (1949) (Testimony by Frederick Bernays Wiener). Despite a lack of prosecutions under Article 98, servicemembers have been awarded relief when their own case has been impacted by unlawful command influence. *See, e.g.*, United States v. Littrice, 13 C.M.R. 43 (C.M.A. 1953) (conviction reversed after the commander's executive officer met with court members before the start of a general court-martial to drive home the commander's expectation that they would vote to convict and impose a severe sentence); United States v. Whitley, 19 C.M.R. 82 (C.M.A. 1955) (conviction reversed after the convening authority during the trial replaced the court president of a special court-martial who had ruled consistently in favor of the defense with a "more qualified" court president).

[259] AW 47(f), 49 of 1948.

[260] The commander's authority to disapprove or approve in whole or in part the findings and sentence was a matter "wholly within [the commander's] discretion[.]" Art. 64, UCMJ (1950). Even before the UCMJ was enacted, the judgment and sentence of a court-martial was "incomplete and inconclusive, being in the nature of a recommendation only" to the commanding officer who convened the court-martial. WINTHROP, *supra* note 2 at 447.

[261] Pub. L. No. 98-209, 97 Stat. 1393 (1983).

In 2014, Congress removed the convening authority's power to modify the findings and sentence, with some exceptions.[262] The convening authority can modify the findings and sentence for light sentences involving minor offenses where the accused was sentenced to less than six months of confinement with no punitive discharge, and where the offense carried a maximum sentence of two years or less of confinement. With respect to all other offenses, the convening authority can reduce the sentence pursuant to a pretrial agreement or upon a recommendation by the trial counsel when the accused provided substantial assistance in the investigation or prosecution of another person.

9. Appellate review

a. Appellate review under the Elston Act

Records of trial not requiring action by a confirming authority under the Elston Act were reviewed by a legal officer in the office of the Judge Advocate General and, if the legal officer was of the opinion that the record was legally deficient in any respect, the record went to the board of review to be examined.[263]

Under the Elston Act, the boards of review examined all cases with sentences to a dishonorable or bad-conduct discharge or to confinement in a penitentiary, except when the discharge was suspended. The boards of review had to determine whether the evidence in each record of trial was legally sufficient to support a conviction by proof beyond a reasonable doubt.[264] In so doing, the boards of review were authorized to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.[265]

But the board of review was essentially only an advisory board; its opinions were not binding unless the Judge Advocate General concurred in the opinion.[266] If the Judge Advocate General disagreed with it, the case was forwarded to higher authority for resolution.

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[262] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013).

[263] AW 50(f) of 1948.

[264] AW 47(c) of 1948.

[265] AW 50(g) of 1948. The Elston Act also created a judicial council, consisting of three general officers, which acted as an appellate review body above the level of the board of review, and which, in certain cases, could also act as a confirming authority. AW 50(a) of 1948. The judicial council reviewed cases when the opinions of the boards of review and the Judge Advocate General differed. AW 50(d)(4), 50(e)(4) of 1948. The judicial council's authority depended on whether the Judge Advocate General agreed with its opinion. AW 48(c) of 1948. If they, too, differed, the case was forwarded to the Secretary of the Army for confirmation. AW 48(b) of 1948. The President had to confirm any sentence to death or sentence involving a general officer. AW 48(a) of 1948.

[266] If the board of review found record to be legally deficient and the Judge Advocate General agreed with the board's opinion, the Judge Advocate General returned the record of trial to the convening authority for a rehearing or other action. AW 50(d)(3), 50(e)(3) of 1948.

After the post-trial review and confirming action were completed, the findings of guilty and the sentence became final and conclusive. Orders publishing the proceedings and all actions taken were binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial.[267]

b. Transformation of the Boards of Review into Appellate Courts

The UCMJ transformed the boards of review into actual appellate courts with authority to issue judicial rulings binding on the Judge Advocate General and all other convening and confirming authorities and whose decisions were reviewable only by the Court of Military Appeals.[268]

In 1968, Congress recast the boards of review as Courts of Military Review,[269] and, in 1994, they were renamed Courts of Criminal Appeals.[270]

c. U.S. Court of Appeals for the Armed Forces

The UCMJ created a civilian court of last resort within the military justice system—the Court of Military Appeals.[271] Congress established the Court to be "completely removed from all military influence or persuasion."[272] The Court originally had three judges, appointed from civilian life by the President, by and with the advice and consent of the Senate for a term of fifteen years.[273] In 1989, Congress increased the number of judges on

[267] AW 50(h) of 1948.

[268] LURIE, *supra* note 125, at 169-206; Willis, *supra* note 178, at 57-63. Congress also did away with judicial councils, which had been part of the Elston Act.

[269] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 1341-42.

[270] Pub. L. No. 103-337, sec. 924, 108 Stat. 2831 (October 5, 1994).

[271] Art. 67, UCMJ (1950). The court's first chief judge described its creation as the most revolutionary step Congress had ever taken to carry out its constitutional responsibility "to make rules for the Government and Regulation of the land and naval Forces." Robert Emmett Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1960-61) (quoting U.S. CONST. art. I, sec. 8, cl. 14). Other common law countries quickly followed the example of the United States in establishing a civilian court of last resort over their military justice system. Direct appeal of military cases to civilian courts was made available in Great Britain in 1951, in Canada in 1952, in New Zealand in 1953, and in Australia in 1955. Wiener, *supra* note 3, at 37 nn.224-28.

[272] Gerald F. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921-1966,* 17 A.F. LAW REV. 55, 66 n.86 (1975) (citing Sen. Estes Kefauver, in *U.S. Congressional Record,* 81st Cong., 2d Sess., 1950, XCVI, Part 1, 1362.).

For Congress, the Court of Military Appeals was merely an extension of the American concept of civilian control over the military. But this concept was vigorously opposed in congressional hearings by military leaders before the UCMJ was adopted. *See, e.g., Hearings on H.R. 2498*, *supra* note 184, at 772-73 (statement of Maj. Gen Kenneth F. Cramer, Chief, National Guard Bureau); Crump, *supra*, at 66.

[273] Art. 67(a)(1), UCMJ (1951).

the Court to five to enhance the Court's stability and effectiveness.[274] In 1994, Congress changed the name of the Court to its current designation—the U.S. Court of Appeals for the Armed Forces.[275]

The U.S. Court of Appeals for the Armed Forces can review a case on appeal on one of three bases: (1) if the accused is a general or flag officer, or the sentence includes the death penalty; (2) if a judge advocate general certifies an issue to the court; or (3) if the court grants a petition for review. [276] The Court's review is mandatory for cases in the first two categories. For the third category, the Court grants a petition for review for "good cause," a determination within the court's discretion. The Court exercises its discretion to address important legal issues or to resolve conflicts among the Services in their interpretation of the UCMJ.

In addition to the authority for direct review of cases from the Courts of Criminal Appeal, the U.S. Court of Appeals for the Armed Forces may consider petitions for extraordinary relief under the All Writs Act.[277]

d. Direct Appeal to the Supreme Court

In 1983, Congress provided for direct review of the Court's decisions by the Supreme Court.[278] Under the Act, parties may petition the Supreme Court for discretionary writs of certiorari in all cases in which the U.S. Court of Appeals for the Armed Forces had granted the petition for review.[279] Since 1983, the Supreme Court has granted review in a relatively small number of cases.[280]

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[274] With only three judges, the replacement of a single judge could produce major swings in the law and in the court's development of precedent. The same could occur if a single judge were to change his or her viewpoint. Such change undermined doctrinal stability and sapped the court's pronouncements of the legitimacy that comes with predictability. Joel D. Miller, *Three is Not Enough*, 1976 ARMY LAW. 11, 13 (Sept. 1976); *see also* Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1216-17 (1997) (a three-judge court needlessly detracted from the court's standing in the American judicial pantheon).

[275] Pub. L. No. 103-337, § 924, 108 Stat. 2831 (1994).

[276] Art. 67(b), UCMJ (1950). In 1983, Congress eliminated mandatory review for cases involving flag or general officers, limiting review in this category to death sentences. Art. 67(b)(1), UCMJ (1983).

[277] The All Writs Act, 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *see, e.g.*, Noyd v. Bond, 395 U.S. 683 (1969); Clinton v. Goldsmith, 526 U.S. 529 (1999); United States v. Denedo , 556 U.S. 904 (2009).

[278] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 1405 (1983).

[279] No direct appeal can be made to the Supreme Court if the U.S. Court of Appeals for the Armed Forces declines to review the case.

[280] *See, e.g.,* Weiss v. United States, 510 U.S. 163 (1994) (military judges who were commissioned officers before their assignment to serve as judges did not need a second appointment before assuming their judicial duties); Davis v. United States, 512 U.S. 452 (1994) (suspect's ambiguous or equivocal reference to attorney

e. Interlocutory appeals by the United States

In the 1983 Act, Congress authorized interlocutory appeals by the prosecution of certain adverse trial rulings.[281] Before then, the government had no ability to appeal a military judge's ruling that terminated the proceedings with respect to a charge or otherwise excluded important evidence. This change allowed government appeals under procedures similar to appeals by the United States in a federal prosecution.

f. Collateral Review

Federal courts outside the military justice system also review court-martial sentences under the standards applicable to collateral review. In addition to jurisdictional issues, a court during collateral review may consider the constitutional claims of servicemembers under the "full and fair" consideration test stated by the Supreme Court in *Burns v. Wilson*.[282]

10. Punitive Articles

The UCMJ added definitions (in Article 1) and offenses on matters pertaining to substantive criminal law, such as principals, accessory after the fact, conviction of a lesser included offense, attempt, conspiracy, solicitation, malingering, and extortion.[283] The UCMJ also carried forward many military-unique offenses, such as desertion, failure to obey an order or regulation, and disrespect towards superior officer.[284] In all, it contained 58 punitive articles. When it came to defining offenses, the UCMJ was a model of clarity, especially when compared to prior versions of the Articles of War or the Articles for the Government of the Navy.

Two punitive articles have been part of military justice system since 1775.[285] They are unique in that, if they had been civilian offenses, the Supreme Court would have struck them down as unconstitutionally vague; but the Court has upheld them when applied to a

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did not require cessation of interrogation); Ryder v. United States, 515 U.S. 177 (1995) (participation of civilian judges without Senate confirmation on the Court of Military Review violated the Appointments Clause); Loving v. United States, 517 U.S. 748 (1996) (Congress delegated to the President the power to promulgate rule restricting death sentence to murders in which aggravating circumstances have been established); Edmond v. United States, 520 U.S. 651 (1997) (Secretary of Transportation could appoint civilian judges to court of criminal appeals); United States v. Scheffer, 523 U.S. 303 (1998) (per se rule against admission of polygraph evidence in court-martial proceedings did not violate the Fifth or Sixth Amendment rights of an accused to present a defense); Clinton v. Goldsmith, 526 U.S. 529 (1999) (invalidating injunction against dropping court-martialed service member from the Air Force rolls); United States v. Denedo, 556 U.S. 904 (2009) (military appellate courts can entertain coram nobis petitions under the All Writs Act).

[281] Pub. L. No. 98-209, 97 Stat. 1393, at 1398 (1983).

[282] 346 U.S. 137 (1953); *see* Rosen, *supra* note 105, at 7-9, 50-65.

[283] Arts. 77-82, 115, and 127, UCMJ (1950).

[284] Arts. 85, 89, and 92, UCMJ (1950).

[285] WINTHROP, *supra* note 2, at 720.

servicemember.[286] The first is "conduct unbecoming an officer and gentleman," and the second is the "General Article."[287]

The General Article prohibits all disorders and neglects prejudicial to good order and discipline, and prohibits all conduct of a nature to bring discredit upon the armed forces.[288] In exercising his authority to designate maximum punishments, the President has defined certain well known offenses under the General Article that are not in enumerated articles.[289] These offenses include kidnapping, negligent homicide, bribery, obstruction of justice, and misprision of a serious offense, among others.[290] Because they are merely Presidentially designated offenses and not enumerated offenses enacted by Congress, the prosecution must allege and prove an extra element in addition to the regular elements of the offenses; this extra element is referred to as the "terminal" element, which consists of showing that the conduct was either prejudicial to good order and discipline or was service discrediting.

IV. Military Justice Reform in Historical Perspective: Managing Change in Challenging Times

In 1950, the military establishment responded in a remarkable manner to the enactment of the UCMJ. The month after President Harry S. Truman signed the new law, the Korean War broke out.[291] Commanders and judge advocates immediately confronted the challenge of implementing an entirely new Code while simultaneously fighting a major war.[292] The military expanded from about 1.5 million in uniform in 1950 to nearly 3 million in 1955. The military's quick expansion brought with it a sharp increase in the number of courts-

[286] The Supreme Court upheld both punitive articles in Parker v. Levy, 417 U.S. 733 (1974) (stating that the military, whose business it was to fight or be ready to fight wars, had a need to regulate aspects of the conduct of its members which in the civilian sphere are left unregulated).

[287] Art. 133, UCMJ (1950); Art. 134, UCMJ (1950) (Clauses 1 and 2 offenses).

[288] The General Article also permits the convening authority to assimilate federal and state crimes and offenses, when they are not capital offenses. Art. 134, UCMJ (1950) (Clause 3 offenses).

[289] The Presidentially designated offenses are listed in the Manual for Courts-Martial at Part IV, paragraphs 61-113.

[290] MCM, Part IV, ¶¶ 89, 92, 95 & 96.

[291] President Truman signed the UCMJ into law on May 5, 1950. Harry S. Truman, *Statement by the President Upon Signing Bill Establishing a Uniform Code of Military Justice*, May 6, 1950. The Korean War began on June 25, 1950. The UCMJ went into effect on May 31, 1951.

[292] The armed services scrambled to train a cadre of lawyers who could implement the UCMJ. In late 1950, the Air Force inaugurated the Judge Advocate General Staff Officer Course at Maxwell Air Force Base, Alabama. PATRICIA A. KEARNS, FIRST 50 YEARS: U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT 27 (2004). Also in 1950, the Army reopened its Judge Advocate General's School, previously located at the University of Michigan in Ann Arbor and deactivated after World War II, in temporary facilities at Fort Myer, Virginia, until a permanent school was established the following year on the campus of the University of Virginia in Charlottesville, where it remains today. THE ARMY LAWYER, *supra* note 5, at 185-86, 217.

martial.[293] Yet the transition into lawyer-conducted general courts-martial was relatively smooth, with no noticeable adverse impact upon military discipline or effectiveness.[294]

[293] The court-martial rate during the Korean War was even higher than during World War II under the Articles of War. Westmoreland & Prugh, *Judges in Command*, *supra* note 201, at 86. For example, the Army's court-martial rate in the Korean War fluctuated between 9.5 and 11.6 courts per thousand soldiers. *Id.* at 90. During World War II, the Army's rate was never more than 6.9 per thousand. *Id.* at 38. Although the Korean War ended in 1953, the Cold War obliged the military to maintain a large force with a global presence. Consequently, judge advocates conducted a total of about two million courts-martial in the first ten years of the UCMJ's existence from 1951 to 1961.

[294] THE ARMY LAWYER, *supra* note 5, at 206. A similar response by commanders and judge advocates to changes in the UCMJ in time of armed conflict was repeated in Vietnam and later conflicts. *See generally* BORCH, *supra* note 244.

Part 2. The Role of the Military Justice Review Group

Establishing the MJRG

The current comprehensive review of the UCMJ had its origins in a memorandum to the Secretary of Defense from General Martin Dempsey, then-Chairman of the Joint Chiefs of Staff. The August 5, 2013 memorandum, written on behalf of the Joint Chiefs, recommended to then-Secretary of Defense Chuck Hagel that he "direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ and the military justice system . . . solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline."[1] The memorandum observed that "much has changed since [the last major review of the UCMJ in 1983], to include the end of the Cold War, the successful integration of the All-Volunteer Force, and the enactment of the Goldwater-Nichols Act of 1986." The Joint Chiefs concluded that a "DOD-led holistic review of the UCMJ and the military justice system would be appropriate."[2]

On October 18, 2013, Secretary Hagel directed the Department of Defense General Counsel to "conduct a comprehensive review of the [UCMJ] and the military justice system with support from military justice experts provided by the Services."[3] Secretary Hagel determined that "[s]uch a review is appropriate given the many amendments to the UCMJ since the Military Justice Act of 1983 and the Manual for Courts-Martial (MCM) since 1984."[4]

Secretary Hagel directed the review to "include an analysis of not only the UCMJ, but also its implementation through the MCM and service regulations."[5] The Secretary also directed the review to consider the June 2014 report and recommendations of the Response Systems Panel.[6] Finally, Secretary Hagel directed the preparation of two reports with

[1] U.S. Dep't of Def., Memorandum from the Chairman of the Joint Chiefs of Staff on Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice (Aug. 5, 2013). The Chairman's memorandum is attached as Appendix A to this Report.

[2] *Id*.

[3] U.S. Dep't of Defense, Memorandum from Secretary of Defense on Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013). Secretary Hagel's memorandum is attached as Appendix B to this Report.

[4] *Id*.

[5] *Id*.

[6] *Id*. Congress directed the Secretary establish the Response Systems Panel to "conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses [under the UCMJ] . . . for the purpose of developing recommendations regarding how to improve the effectiveness of such systems." NDAA FY13, Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013). *See also* REPORT OF THE RESPONSE SYSTEM TO ADULT SEXUAL ASSAULT CRIMES PANEL (June 2014), *available at* http://responsesystemspanel.whs.mil.

relatively short deadlines: (1) a report due in 12 months providing recommendations for amendments to the UCMJ; and (2) a report due in 18 months providing recommendations for amendments to the MCM. Subsequently, the Secretary of Defense set specific deadlines for the report: March 25, 2015, for Part I of the Report (the UCMJ) and September 21, 2015, for Part II (the MCM and service regulations).

As directed by the Secretary of Defense, the DoD General Counsel established the MJRG with support from military justice experts provided by the Services.[7] The MJRG members detailed by the services included: one judge advocate in the grade of O-6 or O-5 with military justice expertise from each of the military services; two additional judge advocates in the grade of O-4 or O-3 with military justice experience from each of the military services; and a noncommissioned officer serving in the legal field from each of the military services. The Coast Guard nominated one military justice expert in the grade of O-5. The services provided all personnel to the MJRG for extended periods of time.

The military personnel on the MJRG served as team members, rather than as service representatives. As such, they were able to provide advice and assistance based upon their experience with the ability to initiate and comment on proposals without obtaining prior approval from their Services. At the same time, the military members were encouraged to engage experts from within their service and in other services as they explored ideas and shaped proposals.

The MJRG staff included civilian personnel with expertise in military and criminal law, as well as experienced legislative counsel. The MJRG also benefited from the assistance of personnel made available on a periodic basis by the DoD General Counsel and the Department of Justice. The General Counsel appointed Andrew S. Effron, former Chief Judge of the United States Court of Appeals for the Armed Forces, to serve as the Director of the MJRG.

The General Counsel designated two distinguished experts in the law, the Honorable David Sentelle, former Chief Judge for the United States Court of Appeals for the District of Columbia Circuit, and the Honorable Judith Miller, former DoD General Counsel, to serve as Senior Advisors to the MJRG. The DoD General Counsel also requested that the Department of Justice designate an expert criminal litigator as an advisor to the MJRG. Mr. Jonathan Wroblewski, Director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice (DoJ), served as DOJ's Advisor to the MJRG. Mr. John Sparks and Mr.

[7] In requesting nominees from the services, the General Counsel stated his expectation that "the judge advocates on the MJRG will have experience as military judges, prosecutors, defense counsel, and victim's counsel, or access to others in their organizations with those perspectives. They may also draw on their experience as staff judge advocates advising military commanders as convening authorities." Terms of Reference for Military Justice Review Committee (Jan. 24, 2014) and Addendum (Mar. 12, 2014) [hereinafter Terms of Reference and Addendum, respectively]. The Addendum changed the name from "Committee" to "Group." Both the Terms of Reference and Addendum are attached as Appendix C to this Report. The Federal Register also announced the MJRG's comprehensive review of the military justice system. 79 Fed. Reg. 28688-28689 (May 19, 2014).

Clark Price have served as advisors to the MJRG from the United States Court of Appeals for the Armed Forces.

The Director and members of the MJRG provided the advisors with periodic updates on the status of the project, and from time to time consulted with the advisors on various issues. The discussions with each advisor, which took place on an individual basis, provided the MJRG with diverse perspectives from experienced experts. The interchanges with the advisors were conducted on an informal basis, not as a matter of coordination, and without any request for or expectation of approval for the Report or any of its components.

Scope of the MJRG's Review

This Report constitutes the MJRG's proposals for amendments to the UCMJ. The MJRG's proposal for changes to the MCM, which were submitted to the DoD General Counsel on September 21, 2015, currently are under review within the Department of Defense. Many aspects of military life and culture help shape and promote discipline within the armed forces in addition to the military justice system and its guiding documents, the UCMJ and MCM. Other important components of a disciplined force include matters such as recruiting and enlistment standards to determine who may serve; training of personnel in military values and culture; establishing an appropriate command climate; and the many administrative options available to commanders to enforce discipline and maintain good order, high morale, and esprit de corps.

Although the statutes, regulations, and policies governing the non-UCMJ aspects of military discipline have a bearing on the operation of the military justice system, an assessment of the impact and effectiveness of the non-UCMJ components of discipline is beyond the scope of this Report. Accordingly, although the MJRG took into account the non-UCMJ aspects of military discipline, the recommendations in Parts I and II of the Report focus on the statutory provisions of the UCMJ, its implementing executive order (MCM), and service implementation.

Guiding Principles and Operational Considerations of the MJRG

The General Counsel issued Terms of Reference for the MJRG, which established objectives and guidance for the MJRG to apply during its review. The Terms of Reference set forth five guiding principles:

- Use the current UCMJ as a point of departure for baseline reassessment.
- Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.
- To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.

- Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.[8]
- Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.[9]

The General Counsel also required the MJRG to "consult with general and flag officers who have had experience as general court-martial convening authorities," and to request the assistance of the Legal Counsel for the Chairman, Joint Chiefs of Staff, to help "conven[e] a meeting or meetings with a suitable group of officers for this purpose."[10] Finally, the General Counsel required the Director to coordinate any proposals, at his discretion, on an ongoing basis with the DoD Deputy General Counsel (Personnel & Health Policy), The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Chairman of the Joint Chiefs of Staff Legal Counsel.[11]

In the course of the review, the MJRG identified six key considerations to provide operational guidance for the MJRG's analysis and to provide a framework for any MJRG proposals:

- ***Discipline****:* National security requires armed forces that are trained, motivated, and highly disciplined.
- ***Unique Features***: History has demonstrated that military discipline requires a court-martial system that differs in important respects from the trial of criminal cases in the civilian sector, including:
    - unique military offenses (e.g., desertion, disrespect, disobedience);
    - unique military punishments (e.g., punitive discharges, reductions in rank); and
    - trials conducted outside the United States (e.g., in deployed and other overseas environments).

[8] The DoD General Counsel also specifically requested the MJRG to assess 14 of the Response System Panel's recommendations. U.S. Dep't of Def., Memorandum of the General Counsel on Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Sep. 29, 2014). The General Counsel's memorandum is attached as Appendix F to this Report.

[9] Terms of Reference, *supra* note 7, at 3.

[10] Addendum, *supra* note 7.

[11] Terms of Reference, *supra* note 7, at 4.

- ***Democratic Values*:** History also has demonstrated that in our democratic society, servicemembers, their families, and the public expect the court-martial process to:
    - employ the standards and procedures of the civilian sector as far as practicable; and
    - counterbalance the limitation of rights available to members of the armed forces and the hierarchical nature of military service with procedures to ensure protection of rights provided under military law.
- ***Personnel Policies***:
    - The military justice system must be sufficiently flexible to function effectively across a wide variety of national and international environments, personnel practices, and operational requirements, regardless of whether the forces are composed of highly motivated volunteers, reluctant conscripts, or a combination of the two. In that regard, the military justice system must be designed not only for today's force, but also for the wide array of force structures that may be needed to address the national security challenges of the future.
    - The court-martial system is critical to the establishment of a disciplined force, but it is not the sole component. The establishment and maintenance of a disciplined force requires effective training, sound leadership, and sound personnel policies.
- ***Periodic Evaluations***: The history of military justice has further demonstrated the need for periodic evaluation and recalibration of the court-martial process to maintain an appropriate balance between the interests of justice and discipline.
- ***Working Assumptions****:*
    - A primary focus of the MJRG's review is to promote justice through enhanced efficiency at all phases of the process.
    - The MJRG should strive to reduce unnecessary litigation by addressing ambiguities, uncertainties, and inconsistencies in rules, statutes, and case law.
    - With respect to recently enacted revisions to the UCMJ, the MJRG should confine further changes to those areas where there is a compelling reason for change, or to harmonize recent legislation with other recommended reforms. Similar considerations should apply with respect to areas with frequent litigation, but stable case law.
    - The MJRG should take into account, but is not bound by, past or current DoD positions on military justice matters.

- The MJRG should take into account the importance of maintaining "system balance"; that is, the balance among factors such as the constitutional and statutory rights of the accused, the power and resources of the prosecutor, the role of the commander, the statutory rights of the victim, and the importance of striving to achieve justice in order to maintain good order and discipline.

Public Input, DoD Outreach Discussions, and Consultation Sessions

In order to most efficiently and thoroughly complete its comprehensive review of the UCMJ and MCM, the MJRG utilized a variety of methods. The MJRG held outreach discussions with various military justice participants from DoD and the military services; the DoD Deputy General Counsel (Personnel & Health Policy) facilitated specific requests for public input; a website informed those wishing to submit comments and suggestions to the MJRG on how to do so; and the MJRG engaged in consultation on selected issues with the Office of the General Counsel, The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel for the Chairman, Joint Chiefs of Staff. Finally, the Director and members of the staff met periodically with the Senior Advisors to the MJRG. Due to the comprehensive nature of the review and the limited time frame within which to conduct it, the MJRG determined it would not be practical to collect or originate military justice data other than that already available from other sources.

Public Input to MJRG. Part I of the Report involves the development of a proposal by an internal DoD group for Department of Defense and executive branch review under standard legislative coordination policies prior to public release. Notwithstanding the internal nature of the MJRG's work, the Department of Defense determined that it would be valuable to provide an opportunity for public input to the MJRG. The Federal Register announced the MJRG's creation and described how the public could submit any desired comments.[12] The DoD Deputy General Counsel (Personnel & Health Policy) sent over 400 letters to various organizations seeking public input to the MJRG.[13] The MJRG also created a website with information on providing comments and suggestions.[14] The MJRG received numerous thoughtful public comments which it considered and incorporated into the review process.

MJRG DoD Outreach Roundtable Discussions. Given the requirement to review every article of the UCMJ within a one year time frame and every provision of the MCM within six months after completing the UCMJ review, it was not practicable for the MJRG to hold hearings, engage in field investigations, or require the services to develop data on the

[12] 79 Fed. Reg. 28688 (May 19, 2014).

[13] Organizations contacted for input included victim advocacy and human rights organizations, veterans' organizations, professional legal organizations, state and local bar associations, and 202 law schools in the United States that grant juris doctorates and are approved by the American Bar Association (ABA).

[14] The MJRG's website is located at http://www.dod.mil/dodgc/mjrg.html.

operation of every component of the UCMJ and MCM. The MJRG's location in Washington, however, enabled the MJRG to benefit from informal meetings with a large number of judge advocates and other military justice experts within the government who not only served in area organizations, but who also had extensive prior experience with military justice activities around the nation and in the deployed environment.

Throughout the spring and summer of 2014, the MJRG engaged in Outreach Roundtable Discussions with various DoD military justice experts, including military criminal investigative organizations, staff judge advocates and convening authorities, trial counsel, defense counsel, appellate counsel for the government and the defense, military trial and appellate judges, special victims' counsel, victim witness/assistance personnel, senior enlisted personnel, commanders, and flag and general officers. The Outreach Discussions provided an opportunity for DoD and Coast Guard military justice experts to engage in informal discussions with the MJRG, and to provide information to the MJRG as it conducted its comprehensive review. In addition, the Outreach Discussions created an opportunity for the DoD Services and the Coast Guard to provide any input they desired for the MJRG's consideration.

In the winter of 2015, the MJRG continued its Outreach Roundtable Discussions, meeting with commanders and senior enlisted personnel at Marine Corp Base Quantico, senior commanders attending the National Defense University at Fort McNair, Washington, District of Columbia, and additional commanders and judge advocates attending The Judge Advocate General's Legal Center and School operated by the Army in Charlottesville, Virginia as well as the school's criminal law faculty.

Consultation Sessions. The General Counsel's Terms of Reference required the MJRG to "consult with general and flag officers who have had experience as general court-martial convening authorities," and to request the assistance of the Legal Counsel for the Chairman, Joint Chiefs of Staff, to help "conven[e] a meeting or meetings with a suitable group of officers for this purpose."[15] With the assistance of the Chairman's Legal Counsel and his staff, the MJRG held two extended sessions with general and flag officers who had served as general court-martial convening authorities. Finally, the DoD General Counsel required the Director to coordinate any proposals, at his discretion, with the DoD Deputy General Counsel (Personnel & Health Policy), The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Chairman of the Joint Chiefs of Staff Legal Counsel. In addition, the General Counsel provided those officials and the military departments with the opportunity to review the MJRG's March 25 report. As directed by the General Counsel, the MJRG had the opportunity to consider, but was not bound by, the suggestions provided during the consultation and review process in the course of preparing the final version of this Report.

[15] Addendum, *supra*, note 7.

The Review Process Methodology

The MJRG Team Process. The MJRG organized the staff into four teams, representing different components of the military justice system: structure; punitive articles; pretrial and trial process; and sentencing and post-trial process. Military justice experts from the Services served as team leads: a general breakdown of the four teams' primary focus areas and responsibilities is below:

Structure Team	
Focus Area	**UCMJ Subchapters: Articles**
A – *Structure* This focus area included a review of the fundamental structure of the military justice system, to include: nonjudicial punishment, courts of inquiry, and all levels of courts-martial; ways to improve funding the courts-martial system; and the rules and procedures for appointment of trial judges and the practice of the separate service trial judiciaries.	Subchapters I: Articles 1, 6-6A Subchapter III: Article 15 Subchapter IV: Articles 16-21 Subchapter V: Articles 22-29 Subchapter VII: Article 37 Subchapter XI: Articles 135-140
B – *Jurisdiction & Preliminary Issues* This focus area included a review of the rules, practices, and procedures related to military criminal investigation, apprehension, pretrial confinement, preliminary hearings, unlawful influence, and courts-martial jurisdiction (including issues related to the overlapping jurisdiction of military, federal, state, and foreign governments).	Subchapter I: Articles 2-5 Subchapter II: Articles 7-11, 13 Subchapter VI: Article 32
Pretrial and Trial Process Team	
Focus Area	**UCMJ Subchapters: Articles**
C – *Pretrial Process* This focus area included a review of the rules, practices, and procedures from the initial disposition of charges to arraignment, including preferral and referral of charges, the role of special victims' counsel, and victims' rights.	Subchapter I: Articles 6b Subchapter II: Articles 12 & 14 Subchapter VI: Articles 30-31, 33-35 Subchapter VII: Article 36

Pretrial and Trial Process Team cont'd	
Focus Area	**UCMJ Subchapters: Articles**
D – *Trial Process* This focus area included a review of the rules, practices, and procedures from arraignment to the announcement of findings, including, among other things, trial procedure, interlocutory appeals, and the Military Rules of Evidence.	Subchapter VII: Articles 38-42, 44-50, 51-53 Subchapter IX: Article 76b
Sentencing and Post Trial Team	
Focus Area	**UCMJ Subchapters: Articles**
E – *Sentencing* This focus area included the rules, practices, and procedures of sentencing proceedings, to include: consideration of whether to adopt mandatory minimums and sentencing guidelines in courts-martial; and the role of the convening authority and the service courts of criminal appeals in reviewing sentences for appropriateness and clemency.	Subchapter VIII: Articles 55-58b
F – *Post-trial & Appellate Review Process* This focus area included the rules, practices, and procedures of post-trial processing and appellate review, to include government appeals; preparation of the record of trial; consideration of processes for automated access to courts-martial and appellate filings; jurisdictional prerequisites for appellate review; the scope of appellate review; and appellate procedures.	Subchapter VII: Article 54 Subchapters IX: Articles 59-76a Subchapter XII: Articles 141-145
Punitive Articles Team	
Focus Area	**UCMJ Subchapters: Articles**
G – *Punitive Articles* This focus area included a comprehensive review of the punitive articles of the UCMJ, to include comparisons to federal offenses in Title 18 of the U.S. Code and the Model Penal Code, and whether to incorporate federal civilian offenses by reference rather than create separate offenses in the UCMJ.	Subchapter VII: Article 43, 50a Subchapter X: Articles 77-134
H – *Standardization and Ongoing Review of the System* This focus area included an examination of the current structure and role of the Code and Joint Service Committees with the aim of improving and making more robust the processes for keeping the military justice system current. This focus area also covers standardization across the services, including standardization with regard to data collection.	Subchapter XII: Article 146

The MJRG Teams conducted their reviews and analyses in two stages. In the first stage, each team researched and analyzed the portions of the UCMJ within their areas of responsibility. Using the DoD General Counsel's Terms of Reference and the MJRG's operational guidance as a framework, the MJRG teams completed a review of the UCMJ and its implementing rules in the MCM in order to identify issues for potential legislative and manual proposals.

For each UCMJ article or MCM rule (or any proposed new article or rule), the responsible MJRG Team compiled the relevant historical background of the UCMJ or MCM provision, and provided a thorough analysis of the provision, including: (1) current practice; (2) key judicial decisions and scholarly commentary; (3) ongoing legislative and regulatory developments; (4) parallel practices, if any, in federal and state criminal law; (5) other sources of law and policy; and (6) and any external proposals for change, such as from the Response Systems Panel or public input. Based on all of this information, the MJRG Team determined whether to propose changing the current provision, propose a new provision, or recommend no change. Each team, and each member of a team, had a full opportunity to comment on the proposals made by other team members and other teams.

There was vigorous and ongoing debate about many ideas and proposals contained in this Report, as well as those that were not included. This included inter- and intra-team in-depth discussions as well as debate and discussion with the Director and the MJRG as a whole, which continued into the Report drafting phase, in order to reach the ultimate decisions on this Report's proposals.

In the second stage of the team review process, the MJRG Teams combined the analysis of the respective UCMJ articles with specific proposed legislative language to prepare the analysis that appears in the Statutory Review and Recommendations section of this Report.

The MJRG submitted the initial draft of the legislative report to the DoD General Counsel on March 25, 2015. Following a period of internal review within the Department of Defense, the MJRG submitted a revised UCMJ report on September 2, 2015. The Department approved the legislative proposals in the revised report as an official Department of Defense proposal, and submitted the proposals to the Office of Management and Budget for interagency review.[16] After considering comments provided during the interagency review, the MJRG prepared this final report, which includes the legislation that has been submitted to Congress as an official administration proposal.

Based upon guidance from the DoD General Counsel, the MJRG also prepared a separate report on implementing rules, focusing primarily on the Manual for Courts-Martial

[16] *See* U.S. DEP'T OF DEF. DIR. 5500.01, PREPARING, PROCESSING, AND COORDINATING LEGISLATION, EXECUTIVE ORDERS, PROCLAMATIONS, VIEWS LETTERS, AND TESTIMONY (Jun. 15, 2007) and OMB Circular A-19.

(MCM).[17] The MJRG's report on the MCM, which was submitted to the DoD General Counsel on September 21, 2015, currently is under review within the Department of Defense.[18]

[17] The President implements the UCMJ and prescribes rules for pretrial, trial, and post-trial procedure by executive order in the MCM.

[18] Based upon guidance from the DoD General Counsel, the MJRG's September 21, 2015 report on the MCM was designated as a "Discussion Draft." The MCM recommendations were drafted with the understanding that revisions would be necessary to reflect any changes in the legislative proposals during the course of interagency review and consideration by the Congress, as well as during any formal coordination of a draft executive order following enactment of amendments to the UCMJ. As such, the MJRG's Discussion Draft serves as the foundation for subsequent development of a proposed executive order, not as an official proposal.

Section B.
Statutory Review and Recommendations

Article-by-Article Index of UCMJ Recommendations

The implementing rules and guidance in the Manual for Courts-Martial for all UCMJ articles, including those recommended to be retained in their current form, will be examined in Part II of the MJRG Report.

SUBCHAPTER I. GENERAL PROVISIONS

§ 801. Art. 1. Definitions

- *Amend the definition of "judge advocate" to properly reflect the change within the Air Force from the "Judge Advocate General's Department" to the "Judge Advocate General's Corps."*
- *Amend the definition of "military judge" to conform to the proposed changes in Art. 30a allowing military judges to address certain matters prior to referral of charges.*

§ 802. Art. 2. Persons subject to this chapter

- *Amend the article to address UCMJ jurisdiction for reserve component members during time periods incidental to Inactive-Duty Training (IDT).*

§ 803. Art. 3. Jurisdiction to try certain personnel

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 804. Art. 4. Dismissed officer's right to trial by court- martial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 805. Art. 5. Territorial applicability of this chapter

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 806. Art. 6. Judge Advocates and legal officers

- *Amend the article to conform the language of the statute to current practice and related statutory provisions.*

§ 806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges

- *Amend the article to conform the language of the statute to current practice and related statutory provisions.*

§ 806b. Art. 6b. Rights of the victim of an offense under this chapter

- *Amend the article to align it with federal law under the Crime Victims' Rights Act, 18 U.S.C. § 3771, regarding the exercise of discretion in the preferral and referral of charges.*
- *Amend the article to align it with federal law under the Crime Victims' Rights Act, 18 U.S.C. § 3771, regarding the procedure for appointment of individuals to assume the rights of a victim who is under 18 years of age, incompetent, incapacitated, or deceased.*
- *Amend the article to incorporate the provisions concerning defense counsel interviews of victims of sex-related offenses, currently located in Article 46(b), extending those provisions to victims of all offenses.*

SUBCHAPTER II. APPREHENSION AND RESTRAINT

§ 807. Art. 7. Apprehension

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 808. Art. 8. Apprehension of deserters

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 809. Art. 9. Imposition of restraint

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 810. Art. 10. Restraint of persons charged with offenses

- *Amend the article to conform the language of the statute to current practice and related statutory provisions.*
- *Amend the article to include all cases when an accused is in pretrial confinement.*
- *This article will be retitled as "Restraint of persons charged."*

§ 811. Art. 11. Reports and receiving of prisoners

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 812. Art. 12. Confinement with enemy prisoners prohibited

- *Amend the article so that the prohibition on confinement of servicemembers with foreign nationals applies only to situations where the foreign nationals are not members of the U.S. Armed Forces and are confined under the law of war.*
- *This article will be retitled as "Prohibition of confinement of armed forces members with enemy prisoners and certain others."*

§ 813. Art. 13. Punishment prohibited before trial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 814. Art. 14. Delivery of offenders to civil authorities

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER III. NON-JUDICIAL PUNISHMENT

§ 815. Art. 15. Commanding Officer's non-judicial punishment

- *Amend the article to eliminate confinement on bread and water as an authorized punishment.*

SUBCHAPTER IV. COURT-MARTIAL JURISDICTION

§ 816. Art. 16. Courts-martial classified

- *Amend the article to establish fixed-sized panels in all courts-martial: eight members in a general court-martial, twelve members in a capital general court-martial, and four members in a special court-martial.*
- *Amend the article to require that a military judge be detailed to all special courts-martial.*
- *Amend the article to authorize a referred judge alone special court-martial with no option for members on findings or sentencing - where the authorized punishment for confinement is limited to six months or less, and no punitive discharge is authorized, pursuant to amendments proposed in Art. 19.*

§ 817. Art. 17. Jurisdiction of courts-martial in general

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 818. Art. 18. Jurisdiction of general courts-martial

- *Retain the article with conforming amendments.*

§ 819. Art. 19. Jurisdiction of special courts-martial

- *Amend the article to limit confinement for any special court-martial referred to a judge-alone bench trial under proposed Art. 16 to six months or less, forfeitures of no more than six months, and no punitive discharge.*

- *Amend the article to allow military magistrates, with the consent of the parties and upon designation by a military judge, to preside over special courts-martial referred to a judge alone under proposed Art. 16.*

§ 820. Art. 20. Jurisdiction of summary courts-martial

- *Amend the article to clarify that a finding of guilt at a summary court-martial is not a conviction from a criminal court.*

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER V. COMPOSITION OF COURTS-MARTIAL

§ 822. Art. 22. Who may convene general courts-martial

- *Retain the article with technical amendments.*

§ 823. Art. 23. Who may convene special courts-martial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 824. Art. 24. Who may convene summary courts-martial

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 825. Art. 25. Who may serve on courts-martial

- *Amend the article to permit detailing enlisted personnel to serve on court-martial panels without a specific request from the accused for enlisted representation, and to permit detailing enlisted members from the same unit as the accused under the same conditions applicable to detailing of officers from the same unit as the accused.*

- *Retain the right of an enlisted accused to specifically elect one-third enlisted panel membership or elect an all-officer panel.*

- *Amend the article to require that the convening authority detail a sufficient number of members for impanelment under the proposed amendments to Article 29.*

§ 825a. Art. 25a. Number of members in capital cases

- *Amend the article to require a fixed panel size of twelve members in capital cases.*

- *This article will be retitled as "Number of court-martial members in capital cases."*

§ 826. Art. 26. Military judge of a general or special court-martial

- *Amend the article to require, as is current practice, that a military judge be detailed to every general and special court-martial.*
- *Amend the article to authorize cross-service detailing of military judges, with the approval of the appropriate Judge Advocate General.*
- *Amend the article to require the appointment by the Judge Advocate General of a chief trial judge in each Armed Force.*
- *Amend the article to establish appropriate criteria for the Judge Advocate General to use in certifying a person for service as a military judge.*
- *Amend the article to authorize the President to establish uniform regulations concerning minimum tour lengths for military judges with provisions for early reassignment as necessary.*

Proposed new article to the UCMJ

§ 826a. Art. 26a. Military magistrates

- *Establish a new article providing for Judge Advocates General certification of military magistrates pursuant to broad qualification criteria, similar to the requirements for military judges.*
- *In the new statute, provide that military magistrates may perform duties other than those under Articles 19 and 30a in accordance with regulations prescribed by the Secretary concerned.*

§ 827. Art. 27. Detail of trial counsel and defense counsel

- *Amend the article to require uniform qualifications for defense counsel at all courts-martial, and to require that all trial counsel and assistant trial counsel meet certain minimum requirements and be determined competent by their Judge Advocate General.*
- *Amend the article to require that, to the greatest extent practicable, at least one defense counsel detailed to a capital case be "learned in the law" applicable to capital cases.*

§ 828. Art. 28. Detail or employment of reporters and Interpreters

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 829. Art. 29. Absent and additional members

- *Amend the article to clarify the function of assembly and impanelment in courts-martial with members and the limited situations in which a member may be absent after assembly.*
- *Amend the article to authorize the impanelment of alternate members on courts-martial, similar to the use of alternate jurors in federal practice.*
- *Amend the article to allow non-capital general courts-martial to proceed after impanelment with not less than six members if members are excused.*
- *This article will be retitled as "Assembly and impaneling of members; detail of new members and military judges."*

SUBCHAPTER VI. PRE-TRIAL PROCEDURE

§ 830. Art. 30. Charges and specifications

- *Retain the article with technical amendments.*

Proposed new article to the UCMJ

§ 830a. Art. 30a. Proceedings conducted before referral

- *Establish a new article authorizing the President to issue regulations permitting military judges or magistrates to consider certain pretrial matters and make judicial rulings on those matters before referral of charges to a court-martial.*
- *Authorize the President to issue regulations setting forth the matters that may be ruled upon and limitations on available remedies.*

§ 831. Art. 31. Compulsory self- incrimination prohibited

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 832. Art. 32. Preliminary hearing

- *Retain the primary focus on an initial determination of probable cause before referring charges to a general court-martial.*
- *Amend the article to revise the requirement for a disposition recommendation to focus the preliminary hearing officer more directly on providing an analysis of information that will be useful in informing the staff judge advocate's recommendation and the convening authority's ultimate disposition decision under Articles 30 and 34.*
- *Amend the article to also provide an opportunity for the parties and the victim to submit material to inform the hearing officer's report and ultimately the Staff Judge*

Advocate recommendation and convening authority decision regarding appropriate disposition of the case.

- *This article will be retitled as "Preliminary hearing required before referral to general court-martial."*

§ 833. Art. 33. Forwarding of charges

- *Strike this article, but incorporate it substantively into Art. 10.*

Proposed new title and content for UCMJ article

§ 833. Art. 33. Disposition guidance

- *Establish a new article requiring that the Secretary of Defense issue non-binding guidance regarding factors that convening authorities and judge advocates should take into account when exercising disposition discretion.*
- *The guidance shall take into account, with appropriate consideration of military requirements, the principles contained in the U.S. Attorney's Manual concerning the fair and evenhanded administration of criminal law.*

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

- *Require that a staff judge advocate's recommendation on whether to refer charges to trial uses the standard of whether referral is "in the interest of justice and discipline."*
- *Enhance the article by requiring that convening authorities consult with a judge advocate on relevant legal issues before referring charges for trial at special courts-martial.*
- *This article will be retitled as "Advice to convening authority before referral for trial."*

§ 835. Art. 35. Service of charges

- *Retain the article with technical amendments.*
- *This article will be retitled as "Service of charges; commencement of trial."*

SUBCHAPTER VII. TRIAL PROCEDURE

§ 836. Art. 36. President may prescribe rules

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 837. Art. 37. Unlawfully influencing action of court

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 838. Art. 38. Duties of trial counsel and defense counsel

- *Amend the article to require that assistant defense counsel in general and special courts-martial be qualified in accordance with proposed changes in Art. 27.*

§ 839. Art. 39. Sessions

- *Retain the article with conforming amendments to align it with the proposals in Articles 16 and 53 for fixed-size member panels, the elimination of special courts-martial without a military judge, and judge-alone sentencing in all non-capital general and special courts-martial.*

§ 840. Art. 40. Continuances

- *Retain the article with conforming amendments.*

§ 841. Art. 41. Challenges

- *Retain the article with conforming amendments to align it with the proposal in Art. 16 for fixed-size member panels, and the elimination of special courts-martial without a military judge.*

§ 842. Art. 42. Oaths

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 843. Art. 43. Statute of limitations

- *Amend the article to increase the statute of limitations for child abuse offenses to 10 years or life of the child, whichever is longer.*
- *Technical amendments to the statute of limitations for offenses under Art. 83 "Fraudulent enlistment" (proposed to be recodified as Art. 104).*
- *Amend the article to extend the statute of limitations for offenses in which DNA evidence implicates an identified person.*
- *Other technical amendments to the article.*
- *Application provision.*

§ 844. Art. 44. Former jeopardy

- *Amend the article by placing the attachment of jeopardy to when the panel members are impaneled after challenges are exercised, instead of when evidence is first introduced.*
- *This amendment will align double jeopardy protections under the UCMJ more closely with federal practice.*

§ 845. Art. 45. Pleas of the accused

- *Amend the article to permit an accused to plead guilty in capital cases where the sentence of death is not mandatory.*
- *Amend the article so that review of deviations from the article's requirements are subject to a "harmless error" standard of review; not all deviations would mandate invalidation of the guilty plea.*
- *Amend the article to eliminate the need for separate Service regulations authorizing entry of findings upon acceptance of a guilty plea.*
- *Other technical amendments to the article.*

§ 846. Art. 46. Opportunity to obtain witnesses and other evidence

- *Amend the article to allow the issuance of investigative subpoenas for the production of evidence prior to referral and preferral of charges. This will align UCMJ subpoena authority with that in federal and state jurisdictions, and improve the operation of the military justice system in this area.*
- *Amend the article by moving the provisions concerning defense counsel interviews of victims to Article 6b, extending these protections to all victims as defined under that article.*
- *Amend the article by providing military judges with the ability to issue warrants and court orders for the production of certain electronic communications under the Stored Communications Act, 18 U.S.C. §2701 et seq. This will align the authority to obtain such evidence for use in courts-martial more closely with federal and state practices.*
- *Amend the article to provide authority to military judges to modify, quash, or order compliance with military subpoenas, issued before or after referral of charges, in conjunction with the subpoena and warrant authorities proposed in the article.*

§ 847. Art. 47. Refusal to appear or testify

- *Amend the article to clarify its function with respect to the enforcement of subpoenas for civilian witnesses and evidence custodians.*
- *This article will be retitled as "Refusal of person not subject to chapter to appear, testify, or produce evidence."*

§ 848. Art. 48. Contempts

- *Amend the article to extend the contempt power of military judges to pre-referral sessions and proceedings, consistent with the proposed amendments to Art. 26 and the authorities proposed in new Art. 30a.*

- *Amend the article to provide for appellate review of contempt punishments in a manner consistent with the review of other orders and judgments under the UCMJ. This will align the UCMJ more closely in this area with the review procedures applicable in federal district courts and federal appellate courts regarding the contempt power.*

- *Amend the article to clarify that judges on the U.S. Court of Appeals for the Armed Forces and the Courts of Criminal Appeals do not have to be "detailed" to cases or proceedings in order to exercise contempt power.*

- *This article will be retitled as "Contempt."*

§ 849. Art. 49. Depositions

- *Amend the article to require that depositions are ordered only when either party demonstrates that the testimony of the prospective witness may be lost and should therefore be preserved for later use at trial.*

- *The proposed amendments will align the use of depositions under the UCMJ more closely with federal practice, and improve the operation of the military justice system in this area.*

- *Amend the article to conform to recent changes to Article 32, by requiring that deposition officers be judge advocates certified under Article 27(b) "whenever practicable."*

- *Other technical and conforming amendments to the article.*

§ 850. Art. 50. Admissibility of records of courts of inquiry

- *Amend the article to permit sworn testimony from a court of inquiry to be either played from an audio or visual recording or read into evidence when it is otherwise admissible.*

- *This article will be retitled as "Admissibility of sworn testimony from records of courts of inquiry."*

§ 850a. Art. 50a. Defense of lack of mental responsibility

- *Retain this article with conforming amendments based on the proposal to eliminate special courts-martial without a military judge.*

§ 851. Art. 51. Voting and rulings

- *Retain the article with conforming amendments.*

§ 852. Art. 52. Number of votes required

- *Amend this article to require concurrence of at least three-fourths (75 percent) of the members present to convict for non-capital offenses and unanimity on the findings and*

sentence for capital offenses, and to conform to the proposal in Article 16 for fixed-size panels in general and special courts-martial.

- *This article will be retitled as "Votes required for conviction, sentencing, and other matters."*

§ 853. Art. 53. Court to announce action

- *Amend the article to require sentencing by a military judge in all general and special courts-martial, except in capital cases. For capital offenses, members would determine whether the sentence shall include death, life without eligibility for parole, or such other lesser punishments as may be determined by the military judge.*

- *This article will be retitled as "Findings and sentencing."*

Proposed new article to the UCMJ

§ 853a. Art. 53a. Plea Agreements

- *Establish a new article to more closely align plea agreements under the UCMJ with federal practice and improve the operation of the military justice system in this area.*

- *Provide statutory authority for convening authorities to enter into plea agreements under the system of sentencing by the military judge, guided by sentencing parameters, proposed in Articles 53 and 56, and consistent with the entry of judgment model proposed in Article 60c.*

§ 854. Art. 54. Record of trial

- *Amend the article to facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records; authorize certification of the record of trial by a court reporter, instead of authentication by the military judge.*

- *Amend the article to require a complete record in any general or special courts-martial in which confinement or forfeitures exceed six months.*

SUBCHAPTER VIII. SENTENCES

§ 855. Art. 55. Cruel and unusual punishments prohibited

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 856. Art. 56. Maximum and minimum limits

- *Amend the article to require "segmented" sentencing in general and special courts-martial, where confinement is adjudged for each individual guilty finding; this further aligns sentencing under the UCMJ with federal practice, and will improve the operation of the military justice system in this area.*

- *Amend the article to establish sentencing parameters and criteria for use in general and special courts-martial to provide guidance to military judges in determining an appropriate sentence.*
- *Establish a Board, within the Department of Defense, to develop sentencing parameters and criteria as well as review and recommend changes to sentencing rules and procedures.*
- *Amend the article to authorize appeal by the government, in limited circumstances, of awarded sentences.*
- *This article will be retitled as "Sentencing."*

§ 856a. Art. 56a. Sentence of confinement for life without eligibility for parole

- *Strike this article, but incorporate it substantively into Article 56.*

§ 857. Art. 57. Effective date of sentences

- *Combine Articles 57, 57a, and 71 into one single article that addresses when an accused begins serving a court-martial punishment as well as deferment of punishment.*

§ 857a. Art. 57a. Deferment of sentences

- *Strike this article, but incorporate it substantively into Article 57.*

§ 858. Art. 58. Execution of confinement

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 858a. Art. 58a. Sentences: reduction in enlisted grade upon approval

- *This article will be repealed, and the automatic reductions in grade of enlisted members will sunset when the sentencing parameters and criteria proposed under Art. 56 take effect.*

§ 858b. Art. 58b. Sentences: forfeiture of pay and allowances during confinement

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER IX. POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

§ 859. Art. 59. Error of law; lesser included offense

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 860. Art. 60. Action by the Convening authority

- *Amend the article to address the requirements for a Statement of Trial Results in general and special courts-martial and to authorize the President to establish regulations addressing post-trial motions.*
- *Amend the article to eliminate redundant or unnecessary paperwork in cases where the recent legislation has removed the convening authority's post-trial discretion.*
- *This article will be retitled as "Post-trial processing in general and special courts-martial."*

Proposed new article to the UCMJ

§ 860a. Art. 60a. Limited authority to act on the sentence in specified post-trial circumstances

- *Retain and clarify limitations on the convening authority's ability to act on the findings and sentence of most general and special courts-martial, with conforming amendments to align the article with other revisions to post-trial processing*
- *Establish restricted authority to suspend sentences of confinement or punitive discharge, limited to cases where the military judge recommends suspension and the convening authority acts within the scope of the military judge's recommendation.*

Proposed new article to the UCMJ

§ 860b. Art. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial

- *Establish this article to clarify the convening authority's power to modify the findings and sentence in all summary courts-martial and any general or special court-martial not covered by the proposed Article 60a, consistent with current law.*

Proposed new article to the UCMJ

§ 860c. Art. 60c. Entry of judgment

- *Establish this article to more closely align post-trial processing under the UCMJ with federal practice, and enhance the operation of the military justice system in this area.*
- *Amend the article to require, in all general and special courts-martial, that the military judge make an "entry of judgment" incorporating the statement of trial results and any post-trial action of the convening authority. In summary courts-martial, the judgment would consist of the findings and sentence of the court-martial, as modified by any post-trial actions of the convening authority.*

§ 861. Art. 61. Waiver or withdrawal of appeal

- *Retain the article with conforming amendments.*
- *This article will be retitled as "Waiver of right to appeal; withdrawal of appeal."*

§ 862. Art. 62. Appeal by the United States

- *Amend the article to authorize the government to appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence; such an appeal would not be authorized when it would violate Article 44's prohibitions on double jeopardy.*
- *Other conforming amendments to the article.*

§ 863. Art. 63. Rehearings

- *Amend the article so that, at a sentencing rehearing, where an accused changes his or her plea to not guilty or otherwise fails to comply with the terms a pretrial agreement, the new sentence that may be awarded is not limited, or capped, by the original sentence.*
- *Remove the prohibition on increased sentences at rehearing after a sentence is set aside based on a government appeal of the sentence.*
- *These amendments will align sentencing rehearings under the UCMJ with federal practice and improve the operation of the military justice system in this area.*

§ 864. Art. 64. Review by a judge advocate

- *Amend the article so that the option for review of a proceeding by a judge advocate applies only to summary courts-martial.*
- *Other conforming amendments to the article.*
- *This article will be retitled as "Judge advocate review of finding of guilty in summary court-martial."*

§ 865. Art. 65. Disposition of records

- *Amend the article to require forwarding for review by an appellate defense counsel a copy of the record of trial for cases eligible for direct access review by the Service Courts of Criminal Appeals under Article 66.*
- *Amend the article to require review in the Office of the Judge Advocate General of all general and special court-martial cases not eligible for direct access review by the Courts of Criminal Appeals under proposed Article 66.*
- *Amend the article to require review in the Office of the Judge Advocate General of all court-martial cases that are eligible for direct access review by Courts of Criminal Appeals under Art. 66, but where appeal has been waived, withdrawn, or not filed.*
- *This article will be retitled as "Transmittal and review of records."*

§ 866. Art. 66. Review by Court of Criminal Appeals

- *Amend the article to replace the automatic review of all non-capital cases with an "appeal of right."*
- *Amend the article to authorize direct access to the Courts of Criminal Appeals for all courts-martial that include a sentence greater than six months confinement or a punitive discharge, instead of the current threshold of greater than one year confinement or a punitive discharge.*
- *Amend the article to authorize direct access to the Courts of Criminal Appeals for all courts-martial in which the government previously appealed under proposed Article 62.*
- *Amend the article to allow an accused to apply for discretionary review by the Court of Criminal Appeals when the accused is not entitled to file an appeal of right.*
- *Amend the article to provide statutory standards for factual sufficiency review, sentencing appropriateness review, and review of excessive post-trial delays.*
- *This article will be retitled as "Courts of Criminal Appeals."*

§ 867. Art. 67. Review by the Court of Appeals for the Armed Forces

- *Amend the article to require notification to other Judge Advocates General in connection with any decision by a Judge Advocate General to certify a case for review by the Court of Appeals for the Armed Forces.*
- *Conforming amendments to align the article to the creation of an "entry of judgment" in Article 60c.*

§ 867a. Art. 67a. Review by the Supreme Court

- *Retain this article with a technical amendment.*

§ 868. Art. 68. Branch offices

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 869. Art. 69. Review in the office of the Judge Advocate General

- *Amend the article to eliminate automatic review of general courts-martial cases by Judge Advocate General not reviewed under Article 66, and to permit the accused to request such a review for a one-year period, extendable to three years for good cause.*
- *Amend the article to provide the accused with an opportunity to request discretionary review by the Court of Criminal Appeals of decisions made by the Office of the Judge Advocate General.*
- *This article will be retitled as "Review by Judge Advocate General."*

§ 870. Art. 70. Appellate counsel

- *Amend the article to require, to the greatest extent practicable, at least one appellate defense counsel be "learned in the law" related to capital cases for any case in which the death penalty was adjudged.*
- *This will align the counsel qualification requirements under the UCMJ more closely with federal practice and enhance the operation of military justice system in this area.*

§ 871. Art. 71. Execution of sentence; suspension of sentence

- *Strike this article, but incorporate it substantively into Art. 57.*

§ 872. Art. 72. Vacation of suspension

- *Amend the article so that a convening authority may authorize a judge advocate to conduct a hearing to make factual determinations about whether a violation occurred that may warrant a decision to vacate a suspension.*
- *This amendment eliminates the requirement that such a hearing be conducted personally by a special court-martial convening authority.*

§ 873. Art. 73. Petition for a new trial

- *Amend the article by expanding the time to file a petition for a new trial to three years after the date of entry of judgment.*

§ 874. Art. 74. Remission and suspension

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 875. Art. 75. Restoration

- *Amend the article to provide the President with explicit authority to establish eligibility criteria for restoration of pay and allowances during the period between the time a court-martial sentence is set aside or disapproved and the time any sentence is imposed upon a new trial or rehearing.*

§ 876. Art. 76. Finality of proceedings, findings, and sentences

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 876a. Art. 76a. Leave required to be taken pending review of certain court-martial convictions

- *Retain the article with conforming amendments.*

§ 876b. Art. 76b. Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

SUBCHAPTER X. PUNITIVE ARTICLES

§ 877. Art. 77. Principals

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 878. Art. 78. Accessory after the fact

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 879. Art. 79. Conviction of lesser included offense

- *Amend this article to authorize the President to issue regulations designating lesser included offenses.*
- *The article will be retitled as "Conviction of offense charged, lesser included offenses, and attempts."*

§ 880. Art. 80. Attempts

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 881. Art. 81. Conspiracy

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 882. Art. 82. Solicitation

- *The offense of "Soliciting another to commit an offense" under Article 134, paragraph 105, will be incorporated into this article.*
- *The article will be retitled as "Soliciting commission of offenses."*

§ 883. Art. 83. Fraudulent enlistment, appointment or separation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new Article 104a.*

Proposed new title and content for UCMJ article

§ 883. Art. 83. Malingering

- *The offense of "Malingering" migrated from Article 115.*

§ 884. Art. 84. Unlawful enlistment, appointment or separation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new Article 104b.*

Proposed new title and content for UCMJ article

§ 884. Art. 84. Breach of medical quarantine

- *The offense of "Breach of medical quarantine" migrated from Article 134, paragraph 100.*

§ 885. Art. 85. Desertion

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 886. Art. 86. Absence without leave

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 887. Art. 87. Missing movement

- *The offense of "missing movement" will remain in this article.*
- *The offense of "Jumping from vessel into the water," under Article 134, paragraph 91, will be incorporated into this article.*
- *This article will be retitled as "Missing movement; jumping from vessel."*

Proposed new article to the UCMJ

§ 887a. Art. 87a. Resisting apprehension, flight, breach of arrest, escape

- *Article 95 will be recodified as new Article 87a, but will not be otherwise amended.*

Proposed new article to the UCMJ

§ 887b. Art. 87b. Offenses against correctional custody and restriction

- *The offense of "Correctional custody - offenses against," under Article 134, paragraph 70, will be incorporated into this article.*

- *The offense of "Restriction, breaking," under Article 134, paragraph 102, will be incorporated into this article.*

§ 888. Art. 88. Contempt toward officials

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 889. Art. 89. Disrespect toward superior commissioned officer

- *The offense of "Disrespect toward superior commissioned officer" will remain in this article.*
- *The offense of "Assault of superior commissioned officer" from Article 90(1) will be incorporated into this article.*
- *This article will be retitled "Disrespect toward superior commissioned officer; assault of superior commissioned officer."*

§ 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

- *The offense of "Willfully disobeying superior commissioned officer" will remain in this article.*
- *The offense of "Assaulting superior commissioned officer" from Article 90(1) will be recodified in Art. 89.*
- *This article will be retitled "Willfully disobeying superior commissioned officer."*

§ 891. Art. 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 892. Art. 92. Failure to obey order or regulation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 893. Art. 93. Cruelty and maltreatment

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 893. Art. 93a. Prohibited activities with military recruit or trainee by person in position of special trust

- *New punitive article that would prohibit sexual activity by recruiters and trainers with recruits and trainees.*

§ 894. Art. 94. Mutiny or sedition

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 895. Art. 95. Resistance, flight, breach of arrest, escape

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new article 87a.*

Proposed new title and content for UCMJ article

§ 895. Art. 95. Offenses by sentinel or lookout

- *The offense of "Misbehavior of sentinel" migrated from Art. 113.*
- *The offense "Loitering or wrongfully sitting on post by sentinel or lookout" from Article 134, paragraph 104(b)(2), will be incorporated into this article.*
- *This article will be titled "Offenses by sentinel or lookout."*

Proposed new article to the UCMJ

§ 895a. Art. 95a. Disrespect toward sentinel or lookout

- *The offense of "Disrespect to a sentinel or lookout" from Article 134, paragraph 104(b)(1), will be incorporated into this article.*

§ 896. Art. 96. Releasing prisoner without proper authority

- *The offense of "Releasing prisoner without proper authority" will remain in this article.*
- *The offense "Drinking liquor with prisoner," under Article 134 paragraph 74, will be incorporated into this article.*
- *This article will be retitled "Release of prisoner without authority; drinking with prisoner."*

§ 897. Art. 97. Unlawful detention

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 898. Art. 98. Noncompliance with procedural rules

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 131f.*

Proposed new title and content for UCMJ article

§ 898. Art. 98. Misconduct as prisoner

- *The offense of "Misconduct as prisoner" migrated from Article 105.*

§ 899. Art. 99. Misbehavior before the enemy

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 900. Art. 100. Subordinate compelling surrender

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 901. Art. 101. Improper use of countersign

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 902. Art. 102. Forcing a safeguard

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 903. Art. 103. Captured or abandoned property

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 108a.*

Proposed new title and content for UCMJ article

§ 903. Art. 103. Spies

- *The offense of "Spies" migrated from Art. 106.*
- *Amend the article to remove mandatory punishment of death for this offense.*

Proposed new article to the UCMJ

§ 903a. Art. 103a. Espionage

- *The offense of "Espionage" migrated from Article 106a.*

Proposed new article to the UCMJ

§ 903b. Art. 103b. Aiding the enemy

- *The offense of "Aiding the enemy" migrated from Article 104.*

§ 904. Art. 104. Aiding the enemy

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 103b.*

Proposed new title and content for UCMJ article

§ 904. Art. 104. Public records offenses

- *The offense of "Public record: altering, concealing, removing, mutilating, obliterating, or destroying" under Article 134, paragraph 99, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 904a. Art. 104a. Fraudulent enlistment, appointment or separation

- *The offense of "Fraudulent enlistment, appointment or separation," under Article 83 will be recodified in this article.*

Proposed new article to the UCMJ

§ 904b. Art. 104b. Unlawful enlistment, appointment, separation

- *The offense of "Unlawful enlistment, appointment, separation," under Article 84 will be recodified in this article.*

§ 905. Art. 105. Misconduct as prisoner

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 98.*

Proposed new title and content for UCMJ article

§ 905. Art. 105. Forgery

- *The offense of "Forgery" migrated from Article 123.*

Proposed new article to the UCMJ

§ 905a. Art. 105a. False or unauthorized pass offenses

- *The offense of "False or unauthorized pass offenses," under Article 134, paragraph 77, will be incorporated into this article.*

§ 906. Art. 106. Spies

- *Recodify in Article 103.*

Proposed new title and content for UCMJ article

§ 906. Art. 106. Impersonating an officer, noncommissioned officer, or petty officer, or an agent or official

- *The offense of "Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official," under Article 134, paragraph 86, will be incorporated into this article.*
- *This article will be retitled as "Impersonation of officer, noncommissioned or petty officer, or agent or official," conforming to the definition of "officer" in 10 U.S.C. 101(b)(1).*

§ 906a. Art. 106a. Espionage

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 103a.*

Proposed new title and content for UCMJ article

§ 906a. Art. 106a. Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

- *The offense of "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button," under Article 134, paragraph 113, will be incorporated into this article.*
- *This article will be retitled as "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button."*

§ 907. Art. 107. False official statements

- *The offense of "False official statements" will remain in this article.*
- *The offense of "False swearing," under Article 134, paragraph 79, will be incorporated into this article.*
- *This article will be retitled as "False official statements; false swearing."*

Proposed new article to the UCMJ

§ 907a. Art. 107a. Parole violation

- *The offense of "Parole, violation of," under Article 134, paragraph 97a, will be incorporated into this article.*

§ 908. Art. 108. Military property of United States - loss, damage, destruction, or disposition

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 908a. Art. 108a. Captured, abandoned property

- *The offense of "Captured or abandoned property" migrated from Article 103.*

§ 909. Art. 109. Property other than military property of United States—Waste, spoilage, or destruction

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 909a. Art. 109a. Mail matter: wrongful taking, opening, etc.

- *The offense of "Mail taking, opening, secreting, destroying, or stealing," under Article 134, paragraph 93, will be incorporated into this article.*
- *This article will be retitled "Mail matter: wrongful taking, opening, etc."*

§ 910. Art. 110. Improper hazarding of vessel

- *Amend this article to include "aircraft," so that it will prohibit the improper hazarding of both a vessel and an aircraft.*
- *This article will be retitled "Improper hazarding of vessel or aircraft."*

§ 911. Art. 111. Drunken or reckless operation of vehicle, aircraft, or vessel

- *Retain the text of the article in current form, but lower the blood alcohol content limit for the offense to .08.*
- *Recodify in Article 113.*

Proposed new title and content for UCMJ article

§ 911. Art. 111. Leaving scene of vehicle accident

- *The offense of "Fleeing scene of accident," under Article 134, paragraph 82, will be incorporated into this article.*
- *This article will be retitled "Leaving scene of vehicle accident."*

§ 912. Art. 112. Drunk on duty

- *The offense of "Drunk on duty" will remain in this article.*
- *The offense of "Drunkenness - incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs," under Article 134, paragraph 76, will be incorporated into this article.*
- *The offense of "Drunk prisoner," under Article 134, paragraph 75, will be incorporated into this article*.
- *The article will be retitled as "Drunkenness and other incapacitation offenses*."

§ 912a. Art. 112a. Wrongful use, possession, etc., of controlled substances

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 913. Art. 113. Misbehavior of sentinel

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 95.*

Proposed new title and content for UCMJ article

§ 913. Art. 113. Drunken or reckless operation of vehicle, aircraft, or vessel

- *The offense of "Drunken or reckless operation of vehicle, aircraft, or vessel" migrated from Article 111.*

§ 914. Art. 114. Dueling

- *The offense of "Dueling" will remain in this article.*
- *The offense of "Reckless endangerment," under Article 134, paragraph 100a, will be incorporated into this article.*
- *The offense of "Firearm, discharging—willfully, under such circumstances as to endanger human life," under Article 134, paragraph 81, will be incorporated into this article.*
- *The offense of "Weapon: concealed, carrying," under Article 134, paragraph 112, will be incorporated into this article.*
- *The article will be retitled as "Endangerment offenses*."

§ 915. Art. 115. Malingering

- *Recodify as Article 83 with technical amendments.*

Proposed new title and content for UCMJ article

§ 915. Art. 115. Communicating threats

- *The offense of "Threat or hoax designed or intended to cause panic or public fear," under Article 134, paragraph 109, will be incorporated into this article.*
- *The offense of "Threat, communicating," under Article 134, paragraph 110, will be incorporated into this article.*
- *The article will be retitled as "Communicating threats*."

§ 916. Art. 116. Riot or breach of peace

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 917. Art. 117. Provoking speeches or gestures

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 918. Art. 118. Murder

- *Retain this article with technical amendments to conform to the proposal to address the crime of forcible sodomy in Article 120.*

§ 919. Art. 119. Manslaughter

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 919a. Art. 119a. Death or injury of an Unborn Child

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 919b. Art. 119b. Child endangerment

- *The offense of "Child Endangerment," under Article 134, paragraph 68a, will be incorporated into this article.*

§ 920. Art. 120. Rape and sexual assault generally

- *The definition of "sexual act" in this article will be amended to match the definition used in federal civilian practice in 18 U.S.C. §2246(2)(A)-(D).*

§ 920a. Art. 120a. Stalking

- *Amend this article by revising the statute to include stalking through use of technology, such as electronic communication services, and to include threats to intimate partners.*

- *Recodify in Article 130.*

Proposed new title and content for UCMJ article

§ 920a. Art. 120a. Mails: deposit of obscene matter

- *The offense of "Mails: depositing or causing to be deposited obscene matters in," under Article 134, paragraph 94, will be incorporated into this article.*

§ 920b. Art. 120b. Rape and sexual assault of a child

- *The definition of "sexual act" in this article will be amended to match the definition used in federal civilian practice in 18 U.S.C. §2246(2)(A)-(D).*

§ 920c. Art. 120c. Other sexual misconduct

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 921. Art. 121. Larceny and wrongful appropriation

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 921a. Art. 121a. Unauthorized use of credit cards, debit cards, and other access devices

- *New punitive article that would criminalize larcenies involved with unauthorized use of a credit or debit card, or other access device.*

Proposed new article to the UCMJ

§ 921b. Art. 121b. False pretenses to obtain services

- *The offense of "False pretenses, obtain services under," under Article 134, paragraph 78, will be incorporated into this article.*

- *This article will be titled "False pretenses to obtain services."*

§ 922. Art. 122. Robbery

- *Align this article with federal practice under 18 U.S.C. § 2111 by amending the intent requirement for this offense.*

- *The amended article will require proof of a forcible taking of the property by the accused from the victim, in the presence of the victim; the requirement to prove that the accused intend to permanently deprive victim of their property will be deleted.*

Proposed new article to the UCMJ

§ 921c. Art. 122a. Receiving stolen property

- *Article migrated from Article 134, paragraph 106.*
- *This article will be titled "Receiving stolen property."*

§ 923. Art. 123. Forgery

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Article 105.*

Proposed new article to the UCMJ

§ 923. Art. 123. Offenses concerning Government computers

- *New punitive article that would criminalize willful unauthorized access of a U.S. government computer or system, based on an analogous federal statute at 18 U.S.C. §1030.*

§ 923a. Art. 123a. Making, drawing, or uttering check, draft, or order without sufficient funds

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 924. Art. 124. Maiming

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in new Article 128a.*

Proposed new article to the UCMJ

§ 924. Art. 124. Frauds against the United States

- *The offense of "Frauds against the United States" migrated from Article 132.*

Proposed new article to the UCMJ

§ 924a. Art. 124a. Bribery

- *The offenses of "Bribery," under Article 134, paragraph 66, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 924b. Art. 124b. Graft

- *The offenses of "Graft," under Article 134, paragraph 66, will be incorporated into this article.*

§ 925. Art. 125. Forcible sodomy; bestiality

- *The crime of forcible sodomy will be addressed in revised Article 120.*
- *Part II of the Report will address the crime of bestiality in Article 134.*

Proposed new title and content for UCMJ article

§ 925. Art. 125. Kidnapping

- *The offense of "Kidnapping," under Art. 134, paragraph 92, will be incorporated into this article.*

§ 926. Art. 126 - Arson

- *The offense of "Arson" will remain in this article.*
- *The offense of "Burning with intent to defraud," under Article 134, paragraph 67, will be incorporated into this article.*
- *The article will be retitled as "Arson; burning property with intent to defraud."*

§ 927. Art. 127. Extortion

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 928. Art. 128. Assault

- *The offense of "Assault" will remain in this article; the offense will be aligned to match the federal offense found at 18 U.S.C. § 113 to improve operation of military justice practice in this area.*
- *The offense of "Assault – with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking," under Article 134, paragraph 64, will be incorporated into this article with technical amendments.*

Proposed new article to the UCMJ

§ 928a. Art. 128a. Maiming

- *The offense of "Maiming" migrated from Article 124.*

§ 929. Art. 129. Burglary

- *The offense of "Burglary" will remain in this article with technical amendments.*
- *The offense of "Housebreaking," under Article 130, will be incorporated into this article.*
- *The offense of "Unlawful entry," under Article 134, paragraph 111, will be incorporated into this article.*
- *The article will be retitled as "Burglary; unlawful entry."*

§ 930. Art. 130. Housebreaking

- *Recodify in Article 129.*

Proposed new title and content for UCMJ article

§ 930. Art. 130. Stalking

- *The offense of "Stalking" will be migrated from Article 120a, and amended by revising the statute to include stalking through use of technology, such as electronic communication services, and to include threats to intimate partners.*

§ 931. Art. 131. Perjury

- *The offense of "Perjury" will remain in this article.*

Proposed new article to the UCMJ

§ 931a. Art. 131a. Subordination of perjury

- *The offense of "Perjury, subordination of," under Article 134, paragraph 98, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931b. Art. 131b. Obstructing justice

- *The offense of "Obstructing justice," under Article 134, paragraph 96, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931c. Art. 131c. Misprision of serious offense

- *The offense of "Misprision of serious offense," under Article 134, paragraph 95, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931d. Art. 131d. Wrongful refusal to testify

- *The offense of "Testify: wrongful refusal," under Article 134, paragraph 108, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931e. Art. 131e. Prevention of authorized seizure of property

- *The offense of "Seizure: destruction, removal, or disposal of property to prevent," under Article 134, paragraph 103, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931f. Art. 131f. Noncompliance with procedural rules

- *The offense of "Noncompliance with procedural rules" under Article 98, will be incorporated into this article.*

Proposed new article to the UCMJ

§ 931g. Art. 131g. Wrongful interference with adverse administrative proceeding

- *The offense of "Wrongful interference with an adverse administrative proceeding," under Art. 134, paragraph 96a, will be incorporated into this article.*

§ 932. Art. 132. Frauds against the United States

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*
- *Recodify in Art. 124.*

Proposed new title and content for UCMJ article

§ 932. Art. 132. Retaliation

- *Establish a new article that prohibits retaliation against victims and witnesses of crime.*
- *The offense would define retaliation as when a person, with the intent to retaliate against any person for reporting or planning to report an offense, or with the intent to discourage any person from reporting an offense, wrongfully takes or threatens to take an adverse personnel action against the person, or wrongfully withholds or threatens to withhold a favorable personnel action with respect to the person.*

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 934. Art. 134. General article

- *Amend this article to establish extraterritorial jurisdiction for offenses charged under clause 3 - "all federal crimes not capital," to conform with the UCMJ's intended worldwide jurisdiction.*

§ 934. Art. 134, para 61 - Abusing public animal

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 62 - Adultery

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 64 - Assault – with Intent to Commit Murder, Voluntary Manslaughter, Rape, Robbery, Sodomy, Arson, Burglary, or Housebreaking

- *Codify in Art. 128 as part of a broader assault offense.*

§ 934. Art. 134, para 65 - Bigamy

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 66 – Bribery and graft

- *Codify in Articles 124a and 124b.*

§ 934. Art. 134, para 67 - Burning with intent to defraud

- *Codify in Article 126 as part of a broader arson offense.*

§ 934. Art. 134, para 68 - Check, worthless, making and uttering by dishonorably failing to maintain funds

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 68a - Child Endangerment

- *Codify in Art. 119b.*

§ 934. Art. 134, para 68b - Child Pornography

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 69 - Cohabitation, wrongful

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 70 - Correctional custody - offenses against

- *Codify in Article 87b.*

§ 934. Art. 134, para 71 - Debt, dishonorably failing to pay

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 72 - Disloyal statements

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense.*

Accordingly, this Report does not recommend migrating this offense to an enumerated Article.

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 73 - Disorderly conduct, drunkenness

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 74 - Drinking liquor with prisoner

- *Codify in Article 96.*

§ 934. Art. 134, para 75 - Drunk prisoner

- *Codify in Article 112.*

§ 934. Art. 134, para 76 - Drunkenness - incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drugs

- *Codify in Article 112.*

§ 934. Art. 134, para 77 - False or unauthorized pass offenses

- *Codify in Article 105a.*

§ 934. Art. 134, para 78 - False pretenses, obtaining services under

- *Codify in new Article 121b.*

§ 934. Art. 134, para 79 - False swearing

- *Codify in Article 107.*

§ 934. Art. 134, para 80 - Firearm, discharging—through negligence

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 81 - Firearm, discharging—willfully, under such circumstances as to endanger human life

- *Codify in Article 114.*

§ 934. Art. 134, para 82 - Fleeing scene of accident

- *Codify in Art. 111.*

§ 934. Art. 134, para 83 - Fraternization

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 84 - Gambling with subordinate

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 85 - Homicide, negligent

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 86 – Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official

- *Codify in Article 106.*

§ 934. Art. 134, para 89 - Indecent language

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 91 - Jumping from vessel into the water

- *Codify in Article 87.*

§ 934. Art. 134, para 92 – Kidnapping

- *Codify in Article 125.*

§ 934. Art. 134, para 93 - Mail: taking, opening, secreting, destroying, or stealing

- *Codify in Article 109a.*

§ 934. Art. 134, para 94 - Mails: depositing or causing to be deposited obscene matters in

- *Codify in Article 120a*.

§ 934. Art. 134, para 95 - Misprision of serious offense

- *Codify in Article 131c.*

§ 934. Art. 134, para 96 - Obstructing justice

- *Codify in Article 131b.*

§ 934. Art. 134, para 96a - Wrongful interference with an adverse administrative proceeding

- *Codify in Article 131g.*

§ 934. Art. 134, para 97 - Pandering and prostitution

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*

- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 97a - Parole, violation of

- *Codify in Art. 107a.*

§ 934. Art. 134, para 98 - Perjury; subornation of

- *Codify in Article 131a.*

§ 934. Art. 134, para 99 - Public record: altering, concealing, removing, mutilating, obliterating, or destroying

- *Codify in Article 104.*

§ 934. Art. 134, para 100 - Quarantine: medical, breaking

- *Codify in Article 84.*

§ 934. Art. 134, para 100a - Reckless endangerment

- *Codify in Article 114.*

§ 934. Art. 134, para 102 - Restriction, breaking

- *Codify in Article 87b.*

§ 934. Art. 134, para 103 - Seizure: destruction, removal, or disposal of property to prevent

- *Codify in Article 131e.*

§ 934. Art. 134, para 103a - Self- injury without intent to avoid service

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 104 - Sentinel or lookout: offenses against or by

- *Codify in Articles 95 and 95a.*

§ 934. Art. 134, para 105 - Soliciting another to commit an offense

- *Codify in Article 82.*

§ 934. Art. 134, para 106 – Stolen property: knowingly receiving, buying, concealing

- *Codify in Article 122a.*

§ 934. Art. 134, para 107 – Straggling

- *The terminal element under Article 134 (conduct prejudicial to good order and discipline or service discrediting conduct) is an important element of this offense. Accordingly, this Report does not recommend migrating this offense to an enumerated Article.*
- *Part II of this Report will include a further review and reevaluation of this offense.*

§ 934. Art. 134, para 108 - Testify, wrongful refusal

- *Codify in Article 131d.*

§ 934. Art. 134, para 109 - Threat or hoax designed or intended to cause panic or public fear

- *Codify in Article 115.*

§ 934. Art. 134, para 110 - Threat, communicating

- *Codify in Article 115.*

§ 934. Art. 134, para 111 - Unlawful entry

- *Codify in Article 129.*

§ 934. Art. 134, para 112 - Weapon: concealed, carrying

- *Codify in Article 114.*

§ 934. Art. 134, para 113 - Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

- *Codify in Article 106a.*

SUBCHAPTER XI. MISCELLANEOUS PROVISIONS

§ 935. Art. 135. Courts of inquiry

- *Amend the article to expand its scope by including civilian members of the Department of Homeland Security and the U.S. Coast Guard.*

§ 936. Art. 136. Authority to administer oaths and to act as notary

- *Technical amendments to the title of the article striking the words "and to act as a notary."*

§ 937. Art. 137. Articles to be explained

- *Amend this article to include officers in the group of servicemembers who must have the UCMJ "carefully explained" to them upon entry on active duty.*
- *Amend this article to require that all officers with the authority to convene courts-martial, or impose non-judicial punishment, receive periodic training on the purpose and administration of the UCMJ.*
- *Amend this article to require the Secretary of Defense to maintain and update electronic versions of the UCMJ and MCM readily accessible on the Internet by members of the armed forces and the public.*

§ 938. Art. 138. Complaints of wrongs

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 939. Art. 139. Redress of injuries to property

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 940. Art. 140. Delegation by the President

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

Proposed new article to the UCMJ

§ 940a. Art. 140a - Case management; data collection and accessibility

- *Require the Secretary of Defense to establish and maintain uniform standards for the collection of data useful in assessing the efficiency and effectiveness of the military justice system.*
- *Require the Secretary of Defense to establish a uniform case management system to enhance efficiency and oversight, as well as to increase transparency in the system and foster public access to releasable information.*

SUBCHAPTER XII. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

§ 941. Art. 141. Status

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 942. Art. 142. Judges

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 943. Art. 143. Organization and employees

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 944. Art. 144. Procedure

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 945. Art. 145. Annuities for judges and survivors

- *Amendment of this article is not required to facilitate proposed reforms or consideration of further reforms.*

§ 946. Art. 146. Code committee

- *Amend the article to establish the "Military Justice Review Panel" which will conduct a comprehensive review of the military justice system every eight years.*

Proposed new article to the UCMJ

§ 946a. Art. 146a. Annual Reports

- *Establish an article requiring annual reports regarding the operation of the UCMJ by the U.S. Court of Appeals for the Armed Forces, compiled from information submitted to the court by the Judge Advocates General, and the SJA to the Commandant of the Marine Corps.*
- *Annual reports will be submitted to the Congressional Armed Services Committees, the Secretary of Defense, the Secretary of Homeland Security, and the Secretaries of the Military Departments.*

Punitive Articles After Recodification

SUBPART I. GENERAL PROVISIONS

Art. 77 – Principals

Art. 78 – Accessory after the fact

Art. 79 – Conviction of offense charged, lesser included offenses, and attempts

SUBPART II. INCHOATE OFFENSES

Art. 80 – Attempts

Art. 81 – Conspiracy

Art. 82 – Soliciting commission of offenses

SUBPART III. PLACE OF DUTY OFFENSES

Art. 83 – Malingering

Art. 84 – Breach of medical quarantine

Art. 85 – Desertion

Art. 86 – Absence without leave

Art. 87 – Missing movement; jumping from vessel

Art. 87a – Resistance, flight, breach of arrest, and escape

Art. 87b – Offenses against correctional custody and restriction

SUBPART IV. AUTHORITY OFFENSES

Art. 88 – Contempt toward officials

Art. 89 – Disrespect toward a superior commissioned officer; assault of superior commissioned officer

Art. 90 – Willfully disobeying superior commissioned officer

Art. 91 – Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

Art. 92 – Failure to obey order or regulation

Art. 93 – Cruelty and maltreatment

Art. 93a – Prohibited activities with military recruit or trainee by person in position of special trust

Art. 94 – Mutiny or sedition

SUBPART V. ENEMY/POST OFFENSES

Art. 95 – Offenses by sentinel or lookout

Art. 95a – Disrespect toward sentinel or lookout

Art. 96 – Release of prisoner without authority; drinking with prisoner

Art. 97 – Unlawful detention

Art. 98 – Misconduct as prisoner

Art. 99 – Misbehavior before the enemy

Art. 100 – Subordinate compelling surrender

Art. 101 – Improper use of countersign

Art. 102 – Forcing a safeguard

Art. 103 – Spies

Art. 103a – Espionage

Art. 103b – Aiding the enemy

SUBPART VI. FALSITY OFFENSES

Art. 104 – Public records offenses

Art. 104a – Fraudulent enlistment, appointment, or separation

Art. 104b – Unlawful enlistment, appointment, or separation

Art. 105 – Forgery

Art. 105a – False or unauthorized pass offenses

Art. 106 – Impersonation of officer, noncommissioned or petty officer, or agent or official

Art. 106a – Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

Art. 107 – False official statements; false swearing

Art. 107a – Parole violation

SUBPART VII. DUTY AND PROPERTY OFFENSES

Art. 108 – Military property of United States–Loss, damage, destruction, or wrongful disposition

Art. 108a. – Captured or abandoned property

Art. 109 – Property other than military property of United States - Waste, spoilage, or destruction

Art. 109a – Mail matter: wrongful taking, opening, etc.

Art. 110 – Improper hazarding of vessel or aircraft

Art. 111 – Leaving scene of vehicle accident

SUBPART VIII. DRUG AND ALCOHOL OFFENSES

Art. 112 – Drunkenness and other incapacitation offenses

Art. 112a – Wrongful use, possession, etc., of controlled substances

Art. 113 – Drunken or reckless operation of vehicle, aircraft or vessel

SUBPART IX. BREACH OF PEACE OFFENSES

Art. 114 – Endangerment offenses

Art. 115 – Communicating threats

Art. 116 – Riot or breach of peace

Art. 117 – Provoking speeches or gestures

SUBPART X. OFFENSES AGAINST PERSONS AND PROPERTY

Art. 118 – Murder

Art. 119 – Manslaughter

Art. 119a – Death or injury of an unborn child

Art. 119b – Child endangerment

Art. 120 – Rape and sexual assault generally

Art. 120a – Mails: deposit of obscene matter

Art. 120b – Rape and sexual assault of a child

Art. 120c – Other sexual misconduct

Art. 121 – Larceny and wrongful appropriation

Art. 121a – Fraudulent use of credit cards, debit cards, and other access devices

Art. 121b – False pretenses to obtain services

Art. 122 – Robbery

Art. 122a – Receiving stolen property

Art. 123 – Offenses concerning Government computers

Art. 123a – Making, drawing or uttering check, draft, or order without sufficient funds

Art. 124 – Frauds against the United States

Art. 124a – Bribery

Art. 124b – Graft

Art. 125 – Kidnapping

Art. 126 – Arson; burning property with intent to defraud

Art. 127 – Extortion

Art. 128 – Assault

Art. 128a – Maiming

Art. 129 – Burglary; unlawful entry

Art. 130 – Stalking

SUBPART XI. OBSTRUCTION OFFENSES

Art. 131 – Perjury

Art. 131a – Subordination of perjury

Art. 131b – Obstructing justice

Art. 131c – Misprision of serious offense

Art. 131d – Wrongful refusal to testify

Art. 131e – Prevention of authorized seizure of property

Art. 131f – Noncompliance with procedural rules

Art. 131g – Wrongful interference with an adverse administrative proceeding

Art. 132 – Retaliation

SUBPART XII. OFFENSES OF GENERAL APPLICATION

Art. 133 – Conduct unbecoming an officer and a gentleman

Art. 134 – General article

Subchapter I. General Provisions

Article 1 – Definitions
10 U.S.C. § 801

1. Summary of Proposal

This proposal would amend the current definition of "judge advocate" in Article 1(13)(A) to reflect that a judge advocate in the Air Force is a member of the Air Force Judge Advocate General's Corps. The proposal also would amend the definition of "military judge" in Article 1(10) to reflect proposed changes in Article 30a, allowing limited detailing of military judges outside the context of a referred general or special court-martial case.

2. Summary of the Current Statute

Article 1 provides statutory definitions for certain words and terms used throughout the UCMJ. Currently, the definition of "judge advocate" in Article 1(13) does not reflect the 2003 name change from the "Air Force Judge Advocate General's Department" to the "Air Force Judge Advocate General's Corps." Also, Article 1(10) defines "military judge" to mean "an official of a general or special court-martial detailed in accordance with [Article 26]."

3. Historical Background

Article 1 was designed to define and explain certain words and terms used within the UCMJ. Although the statute has remained relatively unchanged since the UCMJ was enacted in 1950,[1] Congress has periodically amended Article 1 for clarity and to account for changing circumstances.

4. Contemporary Practice

The President has implemented Article 1 through R.C.M. 103. The rule incorporates by reference all Article 1 definitions into the Manual for Courts-Martial, and adds additional definitions applicable throughout the Manual.

5. Relationship to Federal Civilian Practice

The definitions under Article 1, as well as those prescribed by the President under R.C.M. 103, are in many instances similar to the definitions applicable in federal civilian practice, provided under 1 U.S.C. §§ 1-5 and Fed. R. Crim. P. 1.

6. Recommendation and Justification

Recommendation 1.1: Amend Article 1(13)(A) to reflect the change within the Air Force from the "Judge Advocate General's Department" to the "Judge Advocate General's Corps."

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

- Prior to 2003, the Air Force Judge Advocate General's Corps was known as the Judge Advocate General's Department. This amendment would reflect the 2003 change.

Recommendation 1.2: Amend Article 1(10) to conform the definition of "military judge" to the proposed addition of Article 30a, allowing limited detailing of military judges to address matters prior to referral of charges.

- This is a conforming change.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 101. DEFINITIONS.

(a) DEFINITION OF MILITARY JUDGE.—Paragraph (10) of section 801 of title 10, United States Code (article 1 of the Uniform Code of Military Justice), is amended to read as follows:

"(10) The term 'military judge' means a judge advocate designated under section 826(c) of this title (article 26(c)) who is detailed under section 826(a) or section 830a of this title (article 26(a) or 30a)).".

(b) DEFINITION OF JUDGE ADVOCATE.—Paragraph (13) of such section (article) is amended—

(1) in subparagraph (A), by striking "the Army or the Navy" and inserting "the Army, the Navy, or the Air Force"; and

(2) in subparagraph (B), by striking "the Air Force or".

9. Sectional Analysis

Section 101 contains amendments to Article 1 of the UCMJ concerning the definitions of "military judge" and "judge advocate," as follows:

Section 101(a) would amend the definition of "military judge" in Article 1(10) to reflect the changes in Articles 16, 19, 26, and 30a regarding the detailing of military judges. *See* Sections 401, 403, 504, and 602, *infra.*

Section 101(b) would make a technical amendment to Article 1 to reflect the 2003 name change from the "Air Force Judge Advocate General's Department" to the "Air Force Judge Advocate General's Corps."

Article 2 – Persons Subject to this Chapter
10 U.S.C. § 802

1. Summary of Proposal

This proposal would amend Article 2 to clarify personal jurisdiction over reserve component members performing periods of inactive-duty training. This Report does not recommend any other changes to Article 2.

2. Summary of the Current Statute

Article 2 defines which persons are subject to the jurisdiction of courts-martial under the UCMJ. Article 2(a) specifies thirteen categories of persons who, by their membership in a defined category—for example, members of a regular component of the armed forces, cadets and midshipmen, and persons in the custody of the armed forces serving a court-martial sentence, among others—are subject to UCMJ jurisdiction. Of particular relevance to this proposal, Article 2(a)(3) provides jurisdiction over members of a reserve component while on inactive-duty training, including members of the National Guard performing inactive-duty training while in federal service. Article 2(b) specifies that UCMJ jurisdiction for new enlistees commences upon taking the oath of enlistment. Article 2(c) supplements subsection (a), defining additional criteria by which a person serving with an armed force who is not otherwise subject to the Code may "constructively enlist" and thereby be subject to court-martial jurisdiction.[1] Article 2(d) specifies requirements for recalling a servicemember to active duty involuntarily for purposes of military justice proceedings, and Article 2(e) states that jurisdiction under the statute is subject to the mental capacity standards provided in Article 76b.

3. Historical Background

The first American Articles of War, enacted by the Continental Congress in 1775, began with a personal jurisdiction provision that required all officers and soldiers to subscribe to the Articles of War upon their commissioning or enlistment.[2] From that first version of the Articles of War until 1920, similar provisions regarding jurisdiction appeared in either Article 1 or the Articles of War Preamble. In 1920, Congress amended the Articles of War to provide for statutory definitions in Article 1 and, as under the current UCMJ, Congress provided the various categories of persons subject to military law in Article 2.[3] When the

[1] *See, e.g.*, United States v. Fry, 70 M.J. 465 (C.A.A.F. 2012).

[2] AW 1 of 1775. The statute provided that those already in the Army who chose not to subscribe to the new Articles could be discharged or retained subject to the rules and regulations of which they entered the service.

[3] AW 2 of 1920.

UCMJ was enacted in 1950, Congress borrowed from Article 2 of the Articles of War, Article 5 of the proposed Articles for Government of the Navy, and a variety of existing federal statutes to create the new Article 2, delineating twelve categories of persons subject to UCMJ jurisdiction.[4] Since it was first enacted, Article 2 has been amended several times, and the issue of personal jurisdiction under the UCMJ has been contested regularly in both military and civilian courts.[5]

The definitions of some terms are necessary for understanding the application of personal jurisdiction under the UCMJ. As used throughout the Manual for Courts-Martial, the term "active duty" means full-time duty in the active military service of the United States.[6] The term includes full-time training duty, annual training duty, and attendance at a school designated as a service school by law while in active service.[7] "Active service" means service on active duty.[8] "Inactive-duty training," means duty performed pursuant to service regulations as a member of a reserve component of the armed forces.[9] This duty often takes place on weekends in four-hour increments commonly referred to as "drill" periods.

Historically, the armed services took different approaches to exercising jurisdiction over members of a reserve component on inactive-duty training.[10] Prior to the UCMJ's

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see also Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House. Comm. on Armed Services*, 81st Cong. 853-54 (1949) [hereinafter *Hearings on H.R. 2498*].

[5] *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (holding that Congress may not subject ex-servicemembers to trial by court-martial; such former members, like other civilians, are entitled to the benefits and safeguards afforded those tried in federal civilian courts); Reid v. Covert, 354 U.S. 1, 5-6 (1957) (holding that the provisions of Article 2(11), extending court-martial jurisdiction to persons accompanying the armed forces outside the continental limits of the United States, could not be constitutionally applied to trial of civilian dependents of members of the armed forces overseas, in times of peace, for capital offenses); O'Callahan v. Parker, 395 U.S. 258, 273 (1969) (prohibiting trial by court-martial where the member's alleged misconduct was not "service-connected"); Solorio v. United States, 483 U.S. 435 (1987) (overruling Parker and holding that court-martial jurisdiction depends solely on the accused's status as member of armed forces); *see also* United States v. Averette, 19 C.M.A. 363 (1970) (interpreting the prior version of Article 2(10) as providing jurisdiction over civilians only in a time of declared war); REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT (April 18, 1997); United States v. Ali, 71 M.J. 256, 264-65 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013) (holding foreign national working with the Army as a civilian contractor in Iraq subject to court-martial jurisdiction under Article 2(a)(10) as amended by NDAA FY 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2217 (2006) (authorizing jurisdiction over civilians accompanying the armed forces during a "contingency operation.")). This Report focuses primarily on the application of the UCMJ to active and reserve members of the armed forces. Jurisdiction over civilians has not been invoked frequently in recent decades. In that context, this Report does not provide a recommendation to amend Article 2 beyond the specific recommendations regarding reservists under Article 2(3).

[6] 10 U.S.C. § 101 (d)(1); *see* R.C.M. 103(21) (Discussion).

[7] *Id*.

[8] 10 U.S.C. § 101 (d)(3).

[9] 10 U.S.C. § 101 (d)(7).

[10] *Hearings on H.R. 2498*, supra note 4, at 859.

enactment in 1950, the Navy, the Marine Corps, and the Coast Guard exercised jurisdiction in all situations involving reserve training.[11] The Navy extended jurisdiction broadly, subjecting reservists to court-martial jurisdiction for any duty or instruction period, and any time they wore their uniforms.[12] In contrast, the Army historically exercised court-martial jurisdiction over reservists more narrowly, finding jurisdiction only in situations where the reservist was using expensive or dangerous equipment.[13]

During the drafting of the UCMJ, the proposed provision for court-martial jurisdiction over reservists in an inactive-duty training status specified that "reserve personnel who are voluntarily on inactive-duty training authorized by written orders" would be subject to UCMJ jurisdiction.[14] The "written orders" requirement was added to apply jurisdiction only to certain types of training and to provide notice of UCMJ jurisdiction to the personnel concerned.[15] The legislation was further refined during congressional consideration to read: "(3) Reserve personnel while they are on inactive-duty training authorized by written orders voluntarily accepted by them, which orders specify that they are subject to the code."[16] The legislative history indicates that it was the drafters' intent to extend court-martial jurisdiction principally to reservists over training weekends who use dangerous and expensive equipment such as aircraft and ships, and that it was not intended to cover other incidental circumstances.[17] Article 2(3) was enacted in this revised form as part of the UCMJ. In 1979, the statute was redesignated as Article 2(a)(3) without change.[18]

In 1986, Congress amended Articles 2 and 3 to make three changes in jurisdiction over reservists.[19] First, Article 2(a)(3) was modified to eliminate the requirement that the reservist must voluntarily accept orders to active duty in order for court-martial jurisdiction to attach.[20] Second, Article 2(d) was added to provide for authority, under regulations established by the President, to involuntarily activate reservists not on active

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[11] *Id.*; *see also* United States v. Abernathy, 48 C.M.R. 205, 206 (C.M.A. 1974).

[12] *Id.*

[13] *Id*.

[14] *Uniform Code of Military Justice, Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. 859 (1949) [hereinafter *Hearings on S. 857 and H.R. 4080*]; *see also* United States v. Caputo, 18 M.J. 259, 269 (C.M.A. 1984) (compiling a narrative of the applicable Senate legislative history as APPENDIX B).

[15] *Hearings on S. 857 and H.R. 4080*, *supra* note 14, at 155.

[16] *Id*.

[17] *Id*. at 154-55.

[18] Act of Nov. 9, 1979, Pub. L. No. 96-107, Title VIII, § 801(a), 93 Stat. 810. (This redesignation was the result of the addition of subsections (b) and (c) to Article 2).

[19] NDAA FY 1987, Pub. L. No. 99–661, tit. VIII, 100 Stat. 3816 (1986); *see* Lawrence v. Maksym, 58 M.J. 808, 812 (N-M. Ct. Crim. App. 2003) (discussing legislative history to the 1986 amendments to Articles 2 and 3).

[20] *Lawrence*, 58 M.J. at 812.

duty for the purposes of nonjudicial punishment or court-martial proceedings. Third, Article 3(d) was added to provide that a reservist would still be subject to court-martial jurisdiction, even after the termination of a period of active duty or inactive duty for training, for offenses committed during a period of active duty or inactive duty for training.[21]

4. Contemporary Practice

Under Article 2(a)(1), persons subject to UCMJ jurisdiction include "[m]embers of a regular component of the armed forces, including . . . other persons lawfully called or ordered into, or duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it." In addition, Article 2(a)(3) specifies that "[m]embers of a reserve component while on inactive-duty training" are subject to the UCMJ. Misconduct by reservists that takes place outside of inactive-duty drill periods, even if committed on base or in government housing, typically falls outside of UCMJ jurisdiction. Military courts have held to a bright-line rule for personal jurisdiction over reservists, finding no jurisdiction over a reservist who commits an offense when not on active duty or inactive-duty training.[22]

Although Article 2(a)(3) provides a basis for personal jurisdiction over reservists performing inactive-duty training (IDT) in certain circumstances, jurisdictional gaps remain: misconduct by a reserve component member carried out while en route from their home to their IDT drill site, or while berthed in military housing or contract commercial berthing, or during periods in between successive IDTs (i.e. meal breaks and Saturday evenings), or while en route from the IDT site to their home typically all fall outside of UCMJ jurisdiction under current law. Misconduct that occurs during the periods described above, which, for example, could include driving under the influence, damage to government quarters, or a crime of violence, has the potential to negatively affect good order and discipline in the armed forces.

5. Relationship to Federal Civilian Practice

Jurisdictional issues based on military status normally do not arise in federal civilian proceedings except in a narrow class of cases arising under the Military Extraterritorial Jurisdiction Act.[23]

In civil litigation, such as cases involving the Federal Tort Claims Act (FTCA), amenability to military discipline is not sufficient by itself to establish federal liability for the acts of reservists committed outside the scope of their duties.[24]

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[21] *Id.* (citing Willenbring v. Neurater, 48 M.J. 152, 168 (C.A.A.F. 1998)).

[22] *See id.* (citing Major Tyler J. Harder, USA, *Moving Towards the Apex: Recent Developments in Military Jurisdiction*, 2003 ARMY LAW. 3, 15 (April/May 2003)).

[23] 18 U.S.C. § 3261.

6. Recommendation and Justification

Recommendation 2: Amend Article 2 to expand the applicability of UCMJ jurisdiction for reserve component members performing inactive-duty training.

- Under the present interpretation of Article 2(a)(3), UCMJ jurisdiction over reserve component members performing inactive-duty training typically applies only during individual four-hour drill periods. A clarification in the law is needed to ensure that UCMJ jurisdiction applies to misconduct committed by an individual ordered to inactive-duty training throughout the drill period, including after working hours.
- The proposed amendments to Article 2 would enhance good order and discipline in the reserve components of the armed forces by giving commanders better disciplinary options to address misconduct that takes place incident to periods of Inactive-Duty Training.

7. Relationship to Objectives and Related Provisions

- This proposal supports MJRG Operational Guidance by addressing an ambiguity in current law with respect to court-martial jurisdiction over reserve personnel.

8. Legislative Proposal

SEC. 102. CLARIFICATION OF PERSONS SUBJECT TO UCMJ WHILE ON INACTIVE-DUTY TRAINING.

Paragraph (3) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended to read as follows:

"(3)(A) While on inactive-duty training and during any of the periods specified in subparagraph (B)—

"(i) members of a reserve component; and

[24] *See* Hamm v. United States, 483 F.3d 135, 138 (2d Cir. 2007); *see, e.g.*, Hartzell v. United States, 786 F.2d 964, 968 (9th Cir. 1986) ("[A] soldier traveling between duty stations is not acting within the scope of employment notwithstanding the military's general right to control his activities."); Bissell v. McElligott, 369 F.2d 115, 119 (8th Cir. 1966) ("[T]he unique control which the Government maintains over a soldier has little if any bearing upon determining whether his activity is within the scope of his employment.").

"(ii) members of the Army National Guard of the United States or the Air National Guard of the United States, but only when in Federal service.

"(B) The periods referred to in subparagraph (A) are the following:

"(i) Travel to and from the inactive-duty training site of the member, pursuant to orders or regulations.

"(ii) Intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations.

"(iii) Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations.".

9. Sectional Analysis

Section 102 would amend Article 2(a)(3) of the UCMJ to clarify jurisdiction over reserve component members performing periods of inactive-duty training. The amendment would provide commanders clearer authority to address misconduct that takes place during periods incident to inactive-duty training, and during intervals between inactive-duty training on consecutive days.

Article 3 – Jurisdiction to Try Certain Personnel
10 U.S.C. § 803

1. Summary of Proposal

This Report recommends no change to Article 3. Part II of the Report will consider whether any changes are needed in the rules implementing Article 3.

2. Summary of the Current Statute

Article 3 provides UCMJ jurisdiction over four special classes of persons. Article 3(a) provides that if a person commits an offense while subject to the Code, and there is a subsequent break in that jurisdiction, the person is not relieved from amenability to trial for that offense once UCMJ jurisdiction is re-established. Article 3(b) provides for continuing court-martial jurisdiction over individuals who are alleged to have fraudulently obtained a discharge from the military on the issue of the fraudulent discharge. It further provides that if the servicemember is convicted of fraudulently obtaining a discharge, the member is then subject to trial by court-martial for all offenses committed before the fraudulent discharge. Article 3(c) addresses the narrow situation that could arise if a deserter subsequently enlists in the service (or receives a commission) and is then discharged from that second term of service. It provides that the deserter is still subject to UCMJ jurisdiction despite the later discharge. Article 3(d) provides that reservists are still subject to court-martial jurisdiction, even after the termination of a period of active duty or inactive duty for training, for offenses committed during a period of active duty or inactive duty for training if they still have time remaining on their military obligation.

3. Historical Background

Under the Articles of War, court-martial jurisdiction was lost over military personnel following their separation from service.[1] When the UCMJ was enacted in 1950, Article 3(a) established continuing court-martial jurisdiction over certain discharged members for acts they committed prior to their discharge.[2] The original version of Article 3(a) sought to balance the interest in terminating court-martial jurisdiction over an individual following a valid discharge against the interest in holding accountable individuals who committed crimes in a place where state and federal jurisdiction was lacking, and who had been subsequently discharged from the service.[3] The drafters of the UCMJ included subsection (c) to address a case in which the court held that a discharge from the Navy barred military

[1] S. REP. NO. 81-486, at 8 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] S. REP. NO. 81-486, at 8 (1949).

prosecution of a person who had deserted from the Marine Corps, subsequently enlisted in the Navy, and thereafter had been validly discharged from Navy.[4]

In 1955, the Supreme Court held that Congress could not, under its constitutional authority to make rules for the government of the armed forces, subject a servicemember who had been validly discharged to trial by court-martial for a violation of military law committed before the discharge.[5] Subsection (d) was added to the statute in 1986, to provide for continuing UCMJ jurisdiction over reservists despite breaks in their periods of service.[6] In 1987, the President promulgated R.C.M. 204 provisions that reflected and implemented the changes to Article 3(d) as well as other changes made to Article 2, the main statute concerning UCMJ jurisdiction. In 1992, Congress adopted the current form of Article 3(a) to align the statute with controlling case law and contemporary practice.[7]

4. Contemporary Practice

The President has implemented Article 3 through R.C.M. 202 and 204. The Discussion to R.C.M. 202(a) addresses the implementation of the provisions of Article 3(a)-(c). R.C.M. 204 addresses jurisdiction over reserve personnel. Current service regulations specifically provide that members whose enlistments have expired but who are still awaiting formal discharge are subject to UCMJ jurisdiction. Under applicable case law, jurisdiction over active duty military personnel normally continues until: (1) the member receives a valid discharge certificate; (2) there is a final accounting of pay; and (3) the member has completed administrative clearance processes required by his or her Service Secretary.[8]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 3 in federal civilian practice due to aspects of personal jurisdiction unique to the military.

6. Recommendation and Justification

Recommendation 3: No change to Article 3.

[4] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 880-81 (1949) (statement of Felix Larkin) (discussing United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949)).

[5] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13-14 (1955).

[6] NDAA FY 1987, Pub. L. No. 99-661, § 808, 100 Stat 3816 (1986).

[7] NDAA FY 1993, Pub. L. No. 102-484, § 1063, 106 Stat 2315 (1992). In 2000, Congress enacted the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261, which extends federal criminal jurisdiction to validly discharged military members for felony-level federal offenses committed outside the U.S. while the member was subject to the UCMJ.

[8] United States v. Hart, 66 M.J. 273, 275 (C.A.A.F. 2008).

- In view of the well-developed case law addressing Article 3's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 3.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.
- Changes to jurisdiction over reserve personnel recommended in Article 2 would provide more clarity as to when a reservist is subject to UCMJ jurisdiction during periods of training and drilling. The proposed amendments to Article 2 are consistent with the current jurisdictional authority found in Article 3.

Article 4 – Dismissed Officer's Right to Trial by Court-Martial
10 U.S.C. § 804

1. Summary of Proposal

This Report recommends no change to Article 4. Part II of the Report will consider whether any changes are needed in the rules implementing Article 4.

2. Summary of the Current Statute

In time of war, the President may order the dismissal of an officer.[1] Article 4 provides that any officer dismissed by order of the President can make a written application alleging wrongful dismissal. Upon the filing of such an application, the officer must be tried by a general court-martial convened by the President as soon as practicable. If the President fails to convene a court-martial within six months, the Secretary of the service concerned must substitute an administrative discharge for the dismissal ordered by the President. If a court-martial is convened but does not adjudge dismissal or death, the Secretary concerned must substitute an administrative discharge for the dismissal. If an administrative discharge is substituted for a Presidential discharge, only the President can reappoint the officer. If an officer is discharged by administrative action, the officer does not have a right to trial by court-martial under Article 4.

3. Historical Background

Article 4 addresses a difference in procedure that existed between the Army and the Navy prior to the enactment of the UCMJ in 1950.[2] Under the Articles of War, Army officers did not have the right to request a court-martial when dismissed by the President.[3] However, Article 37 of the Articles for the Government of the Navy provided naval officers with such a right.[4] Article 4 provided a uniform rule consistent with the Navy's practice.[5] By

[1] 10 U.S.C. § 1161(a). The phrase "time of war" is not defined in this section or in case law addressing this statute. Article 36 of the earlier Articles for the Government of the Navy provided the President the same authority to dismiss an officer without a court-martial finding. However, instead of providing the authority in "time of war," it withheld the authority "in time of peace." AGN 36 of 1930. Case law interpreting the "in time of peace" provision of Article 36 held that it "contemplated not a mere cessation of the hostilities, but peace in the complete sense, officially proclaimed." *See* Kahn v. Andersen, 255 U.S. 1, 10 (1921).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 888 (1949) [hereinafter *Hearings on H.R. 2498*].

[3] *See, e.g.*, AW 118 of 1920.

[4] AGN 37 of 1930; *see Hearings on H.R. 2498*, *supra* note 2, at 888.

requesting a trial, such officers could 'ameliorate the infamy' of the dismissal by converting it to an administrative discharge, if the result of the trial did not support the dismissal.[6] Article 4 differed from previously existing law in that it provided—depending on the results of the court-martial (or whether the trial was convened in a timely manner)—for the substitution of an administrative discharge rather than completely voiding the dismissal of the President.[7] This change was based on concern that Congress lacked the constitutional authority to provide a means to outright void the decision of the President concerning the dismissal of an officer.[8] The drafters agreed that the President's decision to remove an officer from the service could not be curtailed, but believed the characterization of the officer's service could be changed based on the findings of a subsequent court-martial.[9] Article 4 has remained relatively unchanged since the UCMJ's enactment in 1950.

4. Contemporary Practice

The President has implemented Article 4 through R.C.M. 107. Both the statute and the rule have limited applicability, as the President may only order the dismissal of an officer during time of war and there are other administrative procedures for removing officers from further service.

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 4 in federal civilian practice.

6. Recommendation and Justification

Recommendation 4: No change to Article 4.

- The right of an officer to demand a trial by court-martial after a dismissal by the President during time of war under Article 4 is not contentious and is a stable provision, albeit with limited applicability.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 4.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique feature of military practice.

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[5] *Hearings on H.R. 2498*, *supra* note 2, at 888.

[6] *Id.*

[7] *Id.*

[8] *Id*.

[9] *Id.* at 888-96.

Article 5 – Territorial Applicability of this Chapter
10 U.S.C. § 805

1. Summary of Proposal

This Report recommends no change to Article 5. Part II of the Report will consider whether any changes are needed in the rules implementing Article 5.

2. Summary of the Current Statute

Article 5 provides that the UCMJ is applicable in all places without limitation.

3. Historical Background

Prior to enactment of the UCMJ, Army courts-martial exercised worldwide jurisdiction for most offenses, but Navy courts-martial were conducted under provisions that generated jurisdictional issues.[1] Article 6 of the Articles for the Government of the United States Navy (1930), only allowed military trials for murder when the accused was alleged to have been a person "belonging to any public vessel of the United States," who committed the offense outside the territorial jurisdiction of the United States. Even when this provision was amended in 1945, removing the requirement for the accused to "belong" to a vessel, the geographical limitation on jurisdiction for murder continued to cause confusion and difficulty in cases, leading to calls for its elimination.[2] The UCMJ, as enacted in 1950, adopted the worldwide jurisdictional approach for all offenses[3]. Other than a technical amendment in 1956, there have been no other amendments to this article.

4. Contemporary Practice

The President has implemented Article 5 through Rule for Courts-Martial 201(a)(2).

5. Relationship to Federal Civilian Practice

Article 5 is unique to the military given its worldwide mission and does not have a counterpart in federal civilian law. Geographically, UCMJ jurisdiction reaches every place where servicemembers and other persons subject to the Code are present. Venue in federal civilian practice is governed by the Federal Rules of Criminal Procedure and by statute.[4]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 897 (1949).

[2] *See* Robert S. Pasley and Felix E. Larkin, *Navy Court Martial Proposals for Its Reform*, 33 CORNELL L. REV 199-201 (1947).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] FED. R. CRIM. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.[5] Jurisdiction is provided by statute, such as 18 U.S.C. § 7 (Special Maritime and Territorial Jurisdiction), by some interstate nexus such as a weapon possessed by a felon,[6] or by some other legislative finding. Although federal civilian criminal jurisdiction is generally limited to offenses committed in the special maritime and territorial jurisdiction of the United States, some federal statutes have been given extraterritorial application.[7]

6. Recommendation and Justification

Recommendation 5: No change to Article 5.

- In view of the well-developed case law addressing Article 5's provisions, a statutory change is not necessary. The current statute reflects the expeditionary nature of our armed forces, and is critical to the administration of military justice around the globe. Part II of the Report will consider whether any changes are needed in the rules implementing Article 5.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.
- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

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with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice."); 18 U.S.C. § 3237.

[5] 18 U.S.C. § 3237(a).

[6] 18 U.S.C. § 922(g)(1).

[7] *See generally* U.S. Congressional Research Service, Extraterritorial Application of American Criminal Law, Feb. 15, 2012, *available at* http://fas.org/sgp/crs/misc/94-166.pdf.

Article 6 – Judge Advocates and Legal Officers
10 U.S.C. § 806

1. Summary of Proposal

This proposal would amend Article 6 by broadening the disqualification provision under Article 6(c) to include appellate judges, and counsel who have participated in the same case—including victims' counsel—in any proceeding before a military judge, preliminary hearing officer, or appellate court. Part II of the Report will consider whether any changes are needed in the rules implementing Article 6.

2. Summary of the Current Statute

Article 6 concerns the assignment for duty of judge advocates and the role of staff judge advocates and legal officers in military justice matters. The article contains four subsections. Article 6(a) provides that the assignment for duty of judge advocates shall be made upon the recommendation of the Judge Advocate General or, in the case of Marine Corps judge advocates, by direction of the Commandant of the Marine Corps; and that the Judge Advocate General or senior members of his staff shall make frequent field inspections in supervision of the administration of military justice. Subsection (b) requires convening authorities to communicate directly with their staff judge advocates or legal officers in all military justice matters, and empowers staff judge advocates and legal officers to communicate directly with other staff judge advocates and legal officers in the chain of command, or directly with the Judge Advocate General. Subsection (c) disqualifies military judges, trial and defense counsel, investigating officers, and panel members from later acting as a staff judge advocate or legal officer to any reviewing authority in a case in which they previously participated. Subsection (d) authorizes judge advocates assigned or detailed to hold or exercise the functions of civil offices within the government to perform such duties, subject to reimbursement by the agency concerned under regulations to be prescribed by the Secretary of Defense and the Secretary of Homeland Security.

3. Historical Background

Article 6 was designed to fulfill four related purposes: (1) to place judge advocates and legal officers under the independent control of the Judge Advocates General; (2) to enhance the effectiveness and independence of staff judge advocates and legal officers by requiring direct communication between them and their commanding officers in all military justice matters, and by providing for independent communication among judge advocates; (3) to help prevent interference with the due administration of military justice by the command; and (4) to ensure review of court-martial cases by independent staff judge advocates.[1]

[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 898 (1949) [hereinafter *Hearings on H.R. 2498*]; H.R. REP. No. 81-491, at 12-13 (1949); *see also* MCM, App. 21 (R.C.M. 105, Analysis).

Subsections (a)-(c) of the statute were derived from Articles 47a and 11 of the Articles of War and have changed little since the UCMJ's enactment in 1950.[2] There were no similar provisions in the Articles for the Government of the Navy.[3] In 1967, Congress amended Article 6(a) to provide the Commandant of the Marine Corps (as opposed to the senior judge advocate) with the responsibility for the duty assignments of Marine Corps judge advocates.[4] This change reflected the unique structure of the Marine Corps and its position as a distinct military service within the Department of the Navy. Subsection (d) of the statute, concerning the assignment of judge advocates to hold and exercise the functions of civil office within the government, was added in 1987.[5]

4. Contemporary Practice

The President has implemented subsections (b) and (c) of Article 6 through R.C.M. 105 and R.C.M. 1106(b), respectively. Both rules essentially repeat the statutory provisions.[6] R.C.M. 503(b)-(c) provide that the Judge Advocates General may permit the detailing of counsel or military judges from one service to serve as counsel or military judge in a different armed force, a combatant command, or a joint command, consistent with their authority under Article 6(a) with respect to assignments for duty of judge advocates.

5. Relationship to Federal Civilian Practice

There is no direct federal civilian analogue for Article 6. However, Article 6's provisions concerning the independence of staff judge advocates and legal officers reflect the quasi-judicial role of these officers within the military command structure, similar to rules and canons concerning "judicial independence" in the civilian sector.[7] In addition, 28 U.S.C. § 530B explicitly obligates attorneys for the Government, including Assistant U.S. Attorneys, to observe applicable state rules of professional responsibility, which preclude attorneys from assuming roles in cases where they were previously involved in a different capacity.

6. Recommendation and Justification

Recommendation 6: Amend Article 6(c) to expand the disqualification provision concerning later involvement in the same case as the staff judge advocate or legal officer to also include appellate judges and counsel who have acted in the same case or in any proceeding before a military judge, preliminary hearing officer, or appellate court.

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[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498*, *supra* note 1, at 898.

[3] *Id.*

[4] Act of Dec. 8, 1967, Pub. L. No. 90-179, 81 Stat. 545.

[5] NDAA FY 1987, Pub. L. No. 99-661, § 807(a), 100 Stat. 3905.

[6] *See also* R.C.M. 406(b)(4) (Discussion) ("Grounds for disqualification . . . in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.").

[7] *See, e.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT (2011).

- This proposed amendment would account for the role of victims' counsel (including Special Victims' Counsel under 10 U.S.C. § 1044e) and appellate judges in military practice, ensuring no conflicts of interest when an individual who has been assigned for duty in one of these positions is subsequently assigned for duty as a staff judge advocate to the reviewing authority with respect to the same case.
- This proposal also would account for pre-referral proceedings, such as Article 32 preliminary hearings, where the counsel assigned to represent the government or the defense may not have been specifically detailed as "trial counsel" or "defense counsel." In these situations, the assigned counsel should be disqualified from later action as the staff judge advocate.
- This proposal also reflects recent changes to Article 32, redesignating the "investigating officer" as a "preliminary hearing officer."

7. Relationship to Objectives and Related Provisions

- This proposed change supports MJRG Operational Guidance by addressing an ambiguity in Article 6(c)'s disqualification provision with respect to victims' counsel (including Special Victims' Counsel under 10 U.S.C. § 1044e), appellate judges, and counsel who participate in proceedings prior to referral of charges and specifications for trial, thereby reducing the risk of unnecessary litigation.
- This proposal accounts for the establishment of military magistrates who, when designated to act on matters as authorized under the proposed amendments to Articles 19 and 30a, would be disqualified from further participation in a case in a different capacity.

8. Legislative Proposal

SEC. 103. STAFF JUDGE ADVOCATE DISQUALIFICATION DUE TO PRIOR INVOLVEMENT IN CASE.

Subsection (c) of section 806 of title 10, United States Code (article 6 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) No person who, with respect to a case, serves in a capacity specified in paragraph (2) may later serve as a staff judge advocate or legal officer to any reviewing or convening authority upon the same case.

"(2) The capacities referred to in paragraph (1) are, with respect to the case involved, any of the following:

"(A) Preliminary hearing officer, court member, military judge, military magistrate, or appellate judge.

"(B) Counsel who have acted in the same case or appeared in any proceeding before a military judge, military magistrate, preliminary hearing officer, or appellate court.".

9. Sectional Analysis

Section 103 would amend Article 6, which concerns the assignment for duty of judge advocates and the role of staff judge advocates and legal officers in military justice matters. Article 6(c) currently disqualifies military judges, trial and defense counsel, investigating officers, and panel members from later acting as a staff judge advocate or legal officer to any reviewing authority in a case in which they previously participated. The proposed amendments would expressly cover military magistrates when presiding over pre-referral proceedings under Article 30a, or when presiding, with the parties' consent, over cases referred to judge-alone special courts-martial, under Article 19. See Sections 403, 602, infra. The amendments also would revise the disqualification provision under Article 6(c) to include appellate judges and counsel (including victims' counsel) who have participated previously in the same case or in any proceeding before a military judge (to include a military magistrate designated under Articles 19 or 30a), preliminary hearing officer, or appellate court in the same case.

Article 6a – Investigation and Disposition of Matters Pertaining to the Fitness of Military Judges

10 U.S.C. § 806a

1. Summary of Proposal

This proposal would align Article 6a with the proposal to allow the detailing of military magistrates to proceedings under Article 30a, adding "military magistrates" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by the President. Part II of the Report will consider whether any changes are needed in the rules implementing Article 6a.

2. Summary of the Current Statute

Article 6a directs the President to prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges and military appellate judges to perform their judicial duties. The statute requires that such procedures shall be uniform for all armed forces to the extent practicable, and it directs the President to transmit a copy of the procedures prescribed to the Committees on Armed Services of the Senate and the House of Representatives.

3. Historical Background

Enacted in 1989, Article 6a was intended by Congress to establish procedures to investigate and dispose of allegations concerning judges in the military consistent with similar procedures found in the civilian sector.[1] Other than minor technical amendments in 1996 and 1999, the statute has remained unchanged since its enactment.

4. Contemporary Practice

The President has implemented Article 6a through R.C.M. 109(c), which was added to the rule in 1993.[2] R.C.M. 109 generally delegates responsibility for professional supervision of military judges, judge advocates, and other counsel to the service Judge Advocates General. The specific procedures prescribed in subsection (c) for investigation and disposition of matters pertaining to the fitness of military judges are modeled after the American Bar Association's Model Standards Relating to Judicial Discipline and Disability Retirement (1978) (ABA Model Standards) and the procedures relating to the investigation of complaints against federal judges established by the Judicial Conduct and Disability Act of

[1] *See* H.R. REP. NO. 101-331, at 656 (1989) (Conf. Rep.). *See generally* MCM, App. 21 (R.C.M. 109(c), Analysis).

[2] MCM, App. 21 (R.C.M. 109(c), Analysis).

1980, 28 U.S.C. § 372(c).[3] R.C.M. 109(c) recognizes the overall responsibility of the Judge Advocates General for the professional supervision and discipline of military trial and appellate judges and provides the Judge Advocates General with final disposition authority with respect to any findings and recommendations made during the initial inquiry into the matters alleged.

5. Relationship to Federal Civilian Practice

The procedures prescribed by the President under Article 6a and R.C.M. 109(c) for investigation and disposition of matters pertaining to the fitness of military judges are based on similar federal civilian standards and procedures recommended in the ABA Model Standards and established by federal law under title 28. Specifically, 28 U.S.C. § 351(d)(1) includes "magistrate judge" within the definition of "judge" with respect to investigations into fitness for duty complaints against federal civilian judges.

6. Recommendation and Justification

Recommendation 6a: Amend Article 6a to add "military magistrate" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by the President.

- This proposal is a conforming amendment to align Article 6a with the proposal to allow the detailing of military magistrates to proceedings under Article 30a. The purpose of this proposal is to enable the Judge Advocates General to appropriately investigate complaints of misconduct or lack of fitness with respect to any official designated to perform official judicial duties under the UCMJ.

- Part II of the Report will consider whether any changes are needed in the rules implementing Article 6a, including any updates needed based on the Judicial Improvements Act of 2002, 28 U.S.C. §§ 351-364.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by employing, insofar as practicable, the standards and procedures of the civilian sector pertaining to the investigation and disposition of matters relating to the fitness of officials authorized to perform judicial duties, including federal magistrate judges.

[3] *Id.* This Act was later replaced by the Judicial Improvements Act of 2002, 28 U.S.C. §§ 351-364. *See generally* ELIZABETH B. BAZAN, JUDICIAL DISCIPLINE PROCESS: AN OVERVIEW (2005), *available at* http://fas.org/sgp/crs/misc/RS22084.pdf.

8. Legislative Proposal

SEC. 104. CONFORMING AMENDMENT RELATING TO MILITARY MAGISTRATES.

The first sentence of section 806a(a) of title 10, United States Code (article 6a(a) of the Uniform Code of Military Justice), is amended by striking "military judge" and all that follows through the end of the sentence and inserting "military appellate judge, military judge, or military magistrate to perform the duties of the position involved.".

9. Sectional Analysis

Section 104 would amend Article 6a of the UCMJ to align the statute with the changes proposed in Article 19 and the proposed new sections, Articles 26a and 30a, concerning military magistrates. *See* Sections 403, 507, and 602, *infra.* Article 6a directs the President to prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges and military appellate judges to perform their judicial duties. The proposed amendment would add "military magistrate" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by the President, consistent with federal law concerning the investigation and disposition of matters relating to the fitness of federal magistrate judges in the performance of their judicial duties.

Article 6b – Rights of the Victim of an Offense Under this Chapter

10 U.S.C. § 806b

1. Summary of Proposal

This proposal would amend Article 6b in order to better align military practice with federal civilian practice under the Crime Victims' Rights Act with respect to the relationship between the rights of victims and the disposition of offenses, as well as the procedures for judicial appointment of individuals to assume the rights of certain victims. The proposed amendments also would move recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses into Article 6b and would extend those provisions to victims of all offenses, consistent with related victims' rights provisions.

Part II of the Report will address a number of different areas in the rules implementing (or implicating) Article 6b, with particular emphasis on structuring the victim's role in the disposition decision-making process and ensuring the victim's right to participate in the court-martial process is fully realized. Part II of the Report will address pretrial, trial, and post-trial procedures in the context of victim's rights. In addition, Part II of the Report will consider and address recent and proposed changes to the Military Rules of Evidence impacting victims during the pretrial and trial stages of the court-martial process.

2. Summary of the Current Statute

Article 6b provides victims of offenses under the UCMJ with the following rights:

- To be reasonably protected from the accused;
- To reasonable, accurate, and timely notice of any public hearing or proceeding concerning the continuation of confinement prior to trial of the accused, a preliminary hearing under Article 32, a court-martial, or clemency and parole board proceeding involving the crime, or any release or escape of the accused;
- To not be excluded from any such public hearing or proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
- To be reasonably heard at any public proceeding involving pretrial release, sentencing, or any parole proceeding;
- To reasonably confer with the attorney for the government in the case;
- To restitution as provided by law;

- To proceedings free from unreasonable delay; and
- To be treated with fairness and with respect for the victim's dignity and privacy.

The statute defines a "victim" as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. Subsection (c) states that the military judge shall designate a representative for the victim in a case where the victim is under 18 years of age, not in the military, incompetent, incapacitated, or deceased. The definition of "victim of an offense" under Article 6b applies only to natural persons. Article 6b(d) provides that nothing in the statute authorizes a cause of action for damages against the United States or any of its officers or employees. The statute states that victims may file petitions for writs of mandamus with the Courts of Criminal Appeals when the victim asserts the trial judge erred in rulings under M.R.E. 412 (Relevance of alleged victim's sexual behavior or sexual predisposition) and M.R.E. 513 (Psychotherapist-patient privilege). These interlocutory appeal provisions serve to highlight a victim's right to seek relief by mandamus on the two matters, but they do not restrict victims' ability to seek extraordinary relief under applicable law for violations of the other rights that are listed in Article 6b.[1]

3. Historical Background

Congress enacted Article 6b in 2013.[2] The statute codifies victims' rights under the UCMJ and incorporates many provisions of the federal Crime Victims' Rights Act.[3] In 2014, Congress amended Article 6b to clarify the definition of victim and the authority to appoint individuals to assume the rights of certain victims.[4] The 2014 legislation also added subsection (e) to the statute regarding petitions for writs of mandamus in connection with rulings under M.R.E. 412 and 513.[5]

4. Contemporary Practice

In recent years, legislative changes to the UCMJ have addressed concerns about the manner in which the military justice system has handled sexual assault allegations and the treatment of victims of sexual assault and other sex-related offenses. These changes have served to enhance victims' rights and victim participation throughout the military justice

[1] *See* LRM v. Kastenberg, 72 M.J. 364, 368-69 (C.A.A.F. 2013) (citing cases involving issues other than the rights under M.R.E. 412 and 513).

[2] NDAA FY 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013).

[3] 18 U.S.C. § 3771.

[4] NDAA FY 2015, Pub. L. No. 113-291, § 531(f), 128 Stat. 3292 (2014).

[5] *Id*. at § 535. Congress further amended subsection (e) in 2015 to expand victims' opportunity to seek extraordinary relief. NDAA FY 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726 (2015).

process. The Department of Defense has addressed these changes primarily through directives and additional guidance.[6]

In 2011, Congress enacted legislation providing victims of sexual assault in the military with legal assistance services, sexual assault response coordinators, and victim advocates.[7] In 2013, Congress required the establishment of additional services to provide support to adult victims of sex-related offenses.[8] On August 14, 2013, the Secretary of Defense directed each of the services to implement special victim's advocacy programs to provide legal advice and representation to victims of sex-related offenses.[9] Congress built upon this directive by enacting legislation requiring the services to establish Special Victims' Counsel programs and make available legal assistance and representation to victims of sex-related offenses.[10]

In the NDAA FY 2014, Congress also required the Secretary of Defense to designate an authority within each service to receive and investigate complaints against Department of Defense civilian employees and military personnel relating to the provision of, or violation of, victims' rights under Article 6b.[11] The Response Systems to Adult Sexual Assault Crimes Panel recommended that the Secretary of Defense assess the effectiveness of the complaint processes to determine whether a more uniform process is needed.[12] On December 14, 2014, the Secretary approved the recommendation and referred it to the Services for implementation.[13]

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[6] *See, e.g.*, Dep't of Defense Inst. (DODI) 6495.02 - Sexual Assault Prevention and Response (SAPR) Propram Procedures (28 March 2013); DODI 5505.19, Establishment of Special Victim Investigation and Prosecution (SUIP) Capability Within the Military Criminal Investigative Organizations (MCIOs) (3 Feb. 2015).

[7] NDAA FY 2012, Pub. L. No. 112-81, § 581, 125 Stat. 1298 (2011).

[8] NDAA FY 2013, Pub. L. No. 112-239, § 573, 126 Stat. 1632 (2013).

[9] Memorandum from Secretary of Defense Chuck Hagel, "Sexual Assault Prevention and Response" (14 August 2013).

[10] NDAA FY 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 966 (2013), adding a Special Victims' Counsel requirement to 10 U.S.C. § 1044e. The Special Victims' Counsel program provides support to victims of sexual assault, enhances the role of victims within the military justice system, and helps to enforce the rights of victims under Article 6b. Pursuant to the program, eligible victims can receive legal advice and representation by a Special Victims' Counsel on a wide array of matters. Special Victims' Counsel assist victims: (1) in understanding the military justice process; (2) by providing legal guidance to victims to allow full participation in applicable programs, services, and the military justice process; and (3) by representing victims in proceedings in connection with the reporting, investigation, and prosecution of sex-related offenses.

[11] *Id.* at § 1701.

[12] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 31 (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT].

[13] Memorandum from Secretary of Defense Chuck Hagel, "Department of Defense Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel" (15 December 2014).

Article 6b became effective immediately upon enactment.[14] A recent executive order contains numerous provisions to implement Article 6b rights throughout the Manual for Courts-Martial.[15] These provisions include the following:

- R.C.M. 305(i) provides crime victims the right to timely notice of the 7-day pretrial confinement review; the right to attend and be heard at a pretrial confinement hearing; and the right to confer with the government counsel.
- R.C.M. 405(i)(2) provides crime victims the right to notice of a preliminary hearing under Article 32, the right to confer with counsel for the government, and the right to be present at a preliminary hearing.
- R.C.M. 801(a)(6) provides procedures to appoint a representative for victims who are minors.
- R.C.M. 806(b)(2) provides crime victims the right to attend a court-martial proceeding and reflects the standard for exclusion from the courtroom articulated in Article 6b(a)(3).
- R.C.M. 906(b)(8) provides crime victims the right to notice of a motion or hearing to release the accused from pretrial confinement, the right to confer with the trial counsel, and the right to be heard on the motion.
- R.C.M. 1001 and R.C.M. 1001A implement the requirements of Article 6b(a)(4)(B) regarding sentencing hearings and further provide crime victims with the right to make an unsworn statement during the sentencing phase in non-capital courts-martial.

5. Relationship to Federal Civilian Practice

Article 6b incorporates into the military justice system many of the rights set forth in the Crime Victims' Rights Act.[16] A recent executive order contains numerous provisions to implement Article 6b rights throughout the Manual for Courts-Martial.[17]

[14] In its report, the Response Systems Panel provided an extended analysis and recommendations concerning implementation of Article 6b in various Manual for Courts-Martial provisions and service regulations. *See* RESPONSE SYSTEMS PANEL REPORT, *supra* note 12, at 28-31. Part II of this Report will address these recommendations and provide additional analysis and recommendations concerning implementation of Article 6b in the MCM.

[15] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[16] 18 U.S.C. § 3771.

[17] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

6. Recommendation and Justification

Recommendation 6b.1: Amend Article 6b to conform military law to federal civilian practice by addressing the relationship between victims' rights under Article 6b and the exercise of disposition discretion under Articles 30 and 34.

- The Crime Victims' Rights Act, which affords numerous rights to crime victims, specifically states that those rights do not impair the prosecutorial discretion of the Attorney General or any officer under his direction. Although Article 6b contains a nearly identical "No cause of action" provision, the statute does not contain a similar provision addressing the relationship of the rights afforded to victims under subsection (a) and the exercise of disposition discretion under the UCMJ.

- This proposal would better align military practice with federal civilian practice, expressly addressing and clarifying the relationship between victims' rights under the UCMJ and the exercise of disposition discretion by convening authorities under Articles 30 and 34.

- The proposed amendment would serve as a foundation for further clarification in the Rules for Courts-Martial and other Manual provisions of the role of victims at various stages in the military justice process.

Recommendation 6b.2: Amend Article 6b to conform military law to federal civilian practice by expanding the options available for assumption of a victim's rights by a proper representative when the victim is under 18 years of age, incompetent, incapacitated, or deceased.

- The Crime Victims' Rights Act provides that, "[i]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative." This proposal would align military practice with federal civilian practice by mirroring the language currently contained in the CVRA, with minor changes to adapt the language to military use.

- The proposed amendment would promote efficiency by eliminating the need for the military judge to designate a representative when another court of competent jurisdiction has already appointed a legal guardian who can assume the rights of the victim on their behalf.

Recommendation 6b.3: Amend Article 6b by incorporating the provisions concerning defense counsel interviews of victims currently located in Article 46(b), extending those provisions to victims of all offenses.

- This provision would address the procedure for interviewing victims in the context of the rights of all who are designated as victims under Article 6b.

7. Relationship to Objectives and Related Provisions

- These proposals support the GC Terms of Reference by incorporating into military justice practice, to the extent practicable, the principles of law and the rules of procedure used in the trial of criminal cases in the U.S. district courts, specifically in the area of victims' rights.
- Accompanying proposals related to the enhancement of victims' rights are addressed in Article 32 (providing for a victim's input on disposition of offenses), Article 54 (increasing access to records of trial for victims of any offense), and Article 140a (providing improved public access to military justice matters).
- Proposals for additional substantive offenses related to the matters under Article 6b include the proposal for Article 93a (improper sexual activity with recruits and trainees), Article 130 (expand the current prohibition against stalking to include cyberstalking and threats to intimate partners), and Article 132 (retaliation against victims and witnesses of crime).

8. Legislative Proposal

SEC. 105. RIGHTS OF VICTIM.

(a) DESIGNATION OF REPRESENTATIVE.—Subsection (c) of section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended in the first sentence by striking "the military judge" and all that follows through the end of the sentence and inserting the following: "the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section.".

(b) RULE OF CONSTRUCTION.—Subsection (d) of such section (article) is amended—

(1) by striking "or" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).".

(c) INTERVIEW OF VICTIM.—Such section (article) is amended by adding at the end the following new subsection:

"(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable.

"(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.".

9. Sectional Analysis

Section 105 contains amendments related to the rights of victims under Article 6b of the UCMJ, as follows:

Section 105(a) would clarify the procedure for appointment of individuals to assume the rights of a victim who is under 18 years of age, incompetent, incapacitated, or deceased,

consistent with the similar provision in the Crime Victims' Rights Act. This change would conform military law to federal civilian law with respect to the procedure for appointment of individuals to assume the rights of certain victims.

Section 105(b) would clarify the relationship between the rights provided to victims under the UCMJ and the exercise of disposition discretion under Articles 30 and 34, consistent with a similar provision in the Crime Victims' Rights Act concerning the exercise of prosecutorial discretion. This change would conform military law to federal civilian law with respect to the relationship between the rights of victims and the duties of government officials to investigate crimes and properly dispose of criminal offenses.

Section 105(c) would move the recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses from Article 46(b) into Article 6b and would extend those provisions to victims of all offenses, consistent with related victims' rights provisions.

Implementing regulations would address a number of matters concerning the rights of victims under Article 6b, to include: the ability of victims to be heard on the plea, confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right not to be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.

Subchapter II. Apprehension and Restraint

Article 7 – Apprehension
10 U.S.C. § 807

1. Summary of Proposal

This Report recommends no change to Article 7. Part II of the Report will consider whether any changes are needed in the rules implementing Article 7.

2. Summary of the Current Statute

Article 7 concerns the apprehension of persons subject to the Code for law enforcement purposes. The article contains three subsections. Article 7(a) defines apprehension as the taking of a person into custody (equivalent to a civilian "arrest"). Article 7(b) provides that any person authorized under regulations governing the armed forces to apprehend persons subject to the Code, or otherwise subject to prosecution under the UCMJ, may do so upon reasonable belief that an offense has been committed and the person to be apprehended committed it. This standard is equivalent to probable cause.[1] In addition, Article 7(c) provides specific authority to commissioned officers, warrant officers, petty officers, and noncommissioned officers to apprehend persons in order to "quell quarrels, frays, and disorders" among persons subject to the Code.

3. Historical Background

Article 7 has not been amended since the enactment of the UCMJ in 1950.[2] The drafters of the UCMJ chose the word "apprehension" to eliminate confusion created by "a certain duality of meaning in the words 'arrest,' 'restraint,' 'confinement,' and words of that character" as those terms were used in the Articles of War and the Articles for the Government of the Navy.[3] Under the Code, "apprehension" refers to the initial taking or seizing of a person into custody. "Arrest" and "confinement" under Article 9, by contrast, refer to subsequent formal actions that may be taken by the accused's commanding officer and that terminate the initial period of custody. The drafters also adopted a standard that embodies the concept of probable cause, while rejecting any requirement for the issuance of a warrant prior to apprehension on the grounds that such a requirement would be inconsistent with the military environment.[4]

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[1] *See* R.C.M. 302(c); *see also* Article 9(d).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 902 (1949) [hereinafter *Hearings on H.R. 2498*]. *See generally* LT Walter E. Hiner, *Apprehension, Arrest, and Confinement*, 1952 JAG JOURNAL 14 (1952).

[4] *See Hearings on H.R. 2498*, supra note 3, at 902.

4. Contemporary Practice

The President has implemented Article 7 through R.C.M. 302. The rule provides that apprehensions under Article 7 may be conducted by military law enforcement officials; commissioned, warrant, petty, and noncommissioned officers; and civilians authorized to apprehend deserters under Article 8. The remainder of the rule provides the standard for apprehension (probable cause) and the procedures applicable to apprehensions.

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice with respect to apprehensions differ slightly in terminology ("arrest" versus "apprehension") and in the procedures required for a lawful apprehension. In the federal civilian system, arrests are generally made upon warrants issued by the court or a magistrate judge under Fed. R. Crim. P. 4 and 9. In military practice, apprehensions may be made by military law enforcement personnel upon probable cause without a warrant.

6. Recommendation and Justification

Recommendation 7: No change to Article 7.

- Part II of the Report will consider whether any changes are needed in the rules implementing Article 7.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 7's substantive provisions, no change is warranted.

Article 8 – Apprehension of Deserters
10 U.S.C. § 808

1. Summary of Proposal

This Report recommends no change to Article 8. Part II of the Report will consider whether any changes are needed in the rules implementing Article 8.

2. Summary of the Current Statute

Article 8 provides that any civilian law enforcement officer authorized to arrest offenders under federal or state laws may summarily apprehend a deserter from the armed forces and deliver the person into military custody.

3. Historical Background

In 1885, the Supreme Court held that a civilian law enforcement officer did not have the authority to arrest a military deserter unless the authority to do so could be "derived from some rule of the law of England which has become a part of our law, or from the legislation of Congress."[1] The Court concluded that English law had never authorized such arrests and that existing U.S. law failed to establish the authority to do so.[2] In 1920, Congress amended the Articles of War to provide civilian law enforcement officers with statutory authority to arrest deserters.[3] Article 8 was based on that original statutory provision and remains virtually unchanged from its original form.[4]

4. Contemporary Practice

The President has implemented Article 8 through R.C.M. 302(b)(3), which restates the statutory provision. The Discussion to R.C.M. 302(b)(3) clarifies that civilian law enforcement officers do not have the authority to apprehend military members for other violations of the UCMJ.

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 8 in federal civilian practice.

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[1] Kurtz vs. Moffitt, 115 U. S. 487, 498 (1885).

[2] *Id.*

[3] AW 106 of 1920; *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 39 (1951).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

6. Recommendation and Justification

Recommendation 8: No change to Article 8.

- Article 8 remains an important statutory authority in military justice practice and is the basis for cooperation between military and civilian law enforcement personnel in desertion cases.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 8.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique feature of military law that is essential to the law enforcement function in desertion cases.

Article 9 – Imposition of Restraint
10 U.S.C. § 809

1. Summary of Proposal

This Report recommends no change to Article 9. Part II of the Report will consider whether any changes are needed in the rules implementing Article 9.

2. Summary of the Current Statute

Article 9 concerns the imposition of restraint, including arrests and confinement, upon persons subject to the Code before and during disposition of offenses. Generally, such forms of restraint are imposed by the order of an accused's commanding officer and act to terminate an initial period of custody following an apprehension under Article 7; however, apprehension is not a prerequisite for the imposition of restraint.[1] Article 9 is divided into five subsections. Subsection (a) defines "arrest" as the restraint of a person by an order, not imposed as a punishment for an offense, directing the person to remain within certain specified limits. "[C]onfinement" is defined as the physical restraint of a person. Subsection (b) provides that an enlisted member may be ordered into arrest or confinement by any commissioned officer or, if authorized by the member's commanding officer, by a warrant, petty, or noncommissioned officer. Subsection (c) provides that commissioned officers, warrant officers, and civilians subject to the Code may be ordered into arrest or confinement only by their commanding officer. Subsection (d) provides that no person may be ordered into arrest or confinement except for probable cause. Finally, subsection (e) clarifies that Article 9's provisions do not limit the authority of persons authorized to make apprehensions under Article 7, such as military law enforcement personnel.

3. Historical Background

Under the Articles of War, the Army used the term "arrest" to refer both to apprehension and the imposition of restraint.[2] The Navy employed the term "close arrest" to describe a practice that was essentially confinement.[3] The drafters of the UCMJ sought to eliminate the confusion created by the use of the term "arrest" to refer both to law-enforcement type apprehensions (Article 7) and command-directed restraint or confinement pending disposition of charges, so they placed these authorities in different articles.[4] Subsections

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[1] *See generally* LT Walter E. Hiner, *Apprehension, Arrest, and Confinement*, 1952 JAG JOURNAL 14 (1952).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 903-4 (1949).

[3] *Id.*

[4] *Id.* at 901-3; *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 35 (1951).

(b)-(d) of Article 9 reflect the practices in place in the Army and the Navy at the time of the article's enactment.[5] Article 9 has not been amended since the UCMJ's enactment in 1950.[6]

In 1993, in *United States v. Rexroat*, the Court of Military Appeals clarified that Supreme Court case law requiring a review of the probable cause basis for pretrial confinement within 48 hours by a "neutral and detached magistrate" applies to military confinement orders under Article 9.[7] However, the court declined to hold that the 48-hour probable cause review must be conducted by a military magistrate. Citing the authority given to all commissioned officers under Article 9(b) to order enlisted members into arrest or confinement, the court held that the 48-hour review could be conducted by a non-magistrate commissioned officer, so long as the officer is "neutral and detached" and not involved in the command's law enforcement function.[8]

4. Contemporary Practice

The President has implemented Article 9 through R.C.M. 304 and 305, which govern pretrial restraint and pretrial confinement, respectively. R.C.M. 304 defines pretrial restraint as "moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses." The rule then defines the different levels of military restraint —conditions on liberty, restriction in lieu of arrest, arrest, and confinement—and the procedures for ordering restraint of persons subject to the Code. R.C.M. 305 provides the rules and procedures applicable to pretrial confinement pending disposition of charges, including review of the confinement decision by commanding officers and neutral and detached pretrial confinement review officers.[9] These rules and procedures are discussed in greater detail in the section of this Report addressing Article 10 (Restraint of persons charged with offenses).

5. Relationship to Federal Civilian Practice

The authority to impose restraint under Article 9 is somewhat analogous to a U.S. district court's authority to issue arrest warrants under Fed. R. Crim. P. 4. Furthermore, the review function of the "neutral and detached officer" under R.C.M. 305(i)(1) (48-hour review) is similar to the function of the magistrate judge at the initial appearance under Fed. R. Crim. P. 5 and applicable Supreme Court case law concerning the 48-hour review requirement.[10]

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[5] *Id.*

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[7] United States v. Rexroat, 38 M.J. 292, 295-96 (C.M.A. 1993) (discussing Gerstein v. Pugh, 420 U.S. 103 (1975) and County of Riverside v. McLaughlin, 500 U.S. 44 (1991)); *see also* Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976) ("those procedures required by the Fourth Amendment in the civilian community must also be required in the military community" unless military necessity requires a different rule).

[8] *Rexroat*, 38 M.J. at 298-99.

[9] *See* R.C.M. 305(i)(1).

[10] *See* Gerstein v. Pugh, 420 U.S. 103 (1975); County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

The notification aspects of the initial appearance under the federal rule are also similar to the charge notification requirement under Article 30(b) and R.C.M. 305(e); however, whereas the magistrate judge provides notice to the defendant of the charges in federal civilian practice, in military practice this is a command function.

6. Recommendation and Justification

Recommendation 9: No change to Article 9.

- Part II of the Report will consider whether any changes are needed in the rules implementing Article 9.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 9's substantive provisions, no change is warranted.

- This recommendation is related to this Report's proposal in Article 30a to authorize military magistrates and military judges to conduct specific judicial functions prior to referral of charges and specifications for trial, including the review of pretrial confinement decisions.

Article 10 – Restraint of Persons Charged with Offenses

10 U.S.C. § 810

1. Summary of Proposal

This proposal would amend Article 10 to conform the language of the statute to current practice and related statutory provisions. Additionally, it would place into Article 10 the requirement for forwarding of charges and, when applicable, the preliminary hearing report, when an accused is in confinement (currently in Article 33 in the form of an eight-day forwarding requirement whenever a person is being "held for trial by general court-martial"). Part II of the Report will consider whether any changes are needed in the rules implementing Article 10.

2. Summary of the Current Statute

Article 10 concerns restraint of persons charged with offenses and, in conjunction with Article 33, the actions that must be taken by military commanders and convening authorities when persons are held for trial by court-martial. The statute provides that any person subject to the Code who is charged with an offense shall, as the circumstances may require, be ordered into arrest or confinement; but that any person charged only with an offense normally tried by a summary court-martial shall not ordinarily be placed in confinement. The statutory authority for commanding officers and other officials to order persons subject to the Code into arrest or confinement is provided separately in Article 9. Article 10 also provides that, when a person is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform the person of the accusation and to either proceed to trial or dismiss the charges and release the person.

3. Historical Background

Article 10 was derived from Articles 69 and 70 of the Articles of War and was generally consistent with the practice in the Navy at the time of the UCMJ's enactment in 1950.[1] However, the provision requiring notice to the confined person did not exist in prior laws or practice.[2] The statute has not been amended since it was enacted. The requirement in the statute that proper authority take "immediate steps" toward trial when an accused has been ordered into arrest or confinement has been interpreted as creating a speedy trial

[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 905 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] S. REP. NO. 81-486, at 10 (1949); *see, e.g.*, AW 70 of 1920 ("When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him.").

right, beyond that provided for in R.C.M. 707 and the Sixth Amendment, for an accused in pretrial confinement.[3]

4. Contemporary Practice

The President has implemented Article 10 through R.C.M. 304 (Pretrial restraint), R.C.M. 305 (Pretrial confinement), and R.C.M. 707 (Speedy trial).

R.C.M. 304(c) and 305(d) address when a person may be ordered into arrest or confinement. R.C.M. 304(e) and 305(e) implement Article 10's notice requirement, and R.C.M. 305(e) provides that an accused who is ordered into confinement must also be promptly informed of his right to remain silent and his right to counsel. R.C.M. 304(c) and R.C.M. 305(d), which address when a person may be ordered into arrest or confinement, combine the probable cause requirement for restraint articulated in Article 9(d) with the "as circumstances may require" standard in Article 10 for continued restraint. With respect to review of pretrial confinement orders, R.C.M. 305 provides for a 48-hour probable cause review by a "neutral and detached officer"; a 72-hour written memorandum by the accused's commander, addressing both probable cause and whether continued confinement is required by the circumstances; and a 7-day review by a "neutral and detached officer"—commonly referred to as the "pretrial confinement hearing officer"—who reviews submissions by the government and the accused and determines whether the accused should remain in confinement or be released.[4] Under current Army practice, a judge advocate specially trained and designated as a military magistrate acts as a pretrial confinement hearing officer in most cases. In the other services, this role is typically performed by line officers.

Under R.C.M. 305(j)-(k), a person ordered into confinement is unable to challenge the appropriateness of the pretrial confinement decision before a military judge with the power to make findings of fact and conclusions of law until the case is referred to a court-martial for trial by a convening authority, which can be several months after the imposition of confinement in many cases.[5] After referral of charges, issues regarding the legality of pretrial confinement may be reviewed by the military judge who has the authority under R.C.M. 305(k) to provide a remedy in the form of day-for-day credit for illegal pretrial confinement.[6]

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[3] *See Hearings on H.R. 2498*, *supra* note 1, at 906-12; United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993) (abrogating the presumption of speedy trial violation when pretrial confinement exceeds 90 days, as previously held under United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), but requiring the government to exercise "reasonable diligence."); *id.* ("Article 10 does not require instantaneous trials, but the mandate that the Government take immediate steps to try arrested or confined accused must ever be borne in mind.").

[4] R.C.M. 305(h)(2)(C), (i)(1)-(2).

[5] R.C.M. 305(j). Under current law, prior to referral and failing a motion for reconsideration with the pretrial confinement review officer, the only possible route for a challenge to the pretrial confinement decision within the military justice system is the unwieldy and narrowly limited opportunity to file an extraordinary writ with a military Court of Criminal Appeals. *See, e.g.*, United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985).

[6] *See* United States v. Adcock, 65 M.J. 18, 23-24 (C.A.A.F. 2007).

R.C.M. 707 assists in enforcement of the requirement under Article 10 for prompt disposition of offenses when the accused is in arrest or confinement, by requiring the government to bring such an accused to trial within 120 days of the imposition of restraint.[7] Under the rule, the remedy for failure to comply with the 120-day requirement is dismissal of the affected charges, possibly with prejudice.[8]

5. Relationship to Federal Civilian Practice

There are some basic similarities between military practice and federal civilian practice in the areas of pretrial confinement review and speedy trial. In both systems, an initial review of the probable cause basis for confinement by a "neutral and detached" official is required within forty-eight hours of the imposition of confinement. And in both systems, speedy trial requirements are amplified when the accused is placed in pretrial confinement. Beyond these basic similarities, however, the systems differ in many ways.

One main difference between military practice and federal civilian practice in the area of pretrial confinement concerns the right to bail, which does not exist in the military.[9] The Bail Reform Act of 1984 prescribes the rules and procedures for pretrial detention of criminal defendants in the federal civilian system, including the rules concerning release of defendants from detention pending trial.[10] Under the law, defendants can be detained even if the charged conduct does not give rise to a rebuttable presumption of detention, and the Government may proceed by proffer at detention hearings.[11] In the military, subject to the confinement review procedures under R.C.M. 305, discretion to impose pretrial confinement on accused military members rests primarily with military commanders.[12] In the federal civilian system, this function is performed by judicial officers, primarily magistrate judges, under 18 U.S.C. § 3142 and Fed. R. Crim. P. 5(d)(3).

A second area of difference between the two systems concerns statutory and regulatory speedy trial provisions. In the federal civilian system, individuals who are arrested are required to be presented to a magistrate judge without unnecessary delay.[13] The Speedy

[7] R.C.M. 707(a)(2).

[8] R.C.M. 707(d).

[9] *See* Levy v. Resor, 37 C.M.R. 399, 402-03 (C.M.A. 1967) (the right to bail pending trial is not constitutional but statutory only and in the military there is no statutory provision for such bail) (citing United States v. Hangsleben, 24 C.M.R. 130, 133 (C.M.A. 1957) ("[I]n the military bail is not available.")).

[10] 18 U.S.C. § 3141 *et seq*.; *see* United States v. Salerno, 481 U.S. 739, 748 (1987) ("We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.").

[11] United States v. Stone, 608 F.3d 939, 948–49 (6th Cir. 2010).

[12] *See Levy*, 37 C.M.R. at 404.

[13] FED. R. CRIM. P. 5(a)(1)(A). *But see* United States v. Encarnacion, 239 F.3d 395, 400 n.5 (1st Cir. 2001) (where unnecessary delay before the probable cause hearing is not used to subject defendant to unwarranted interrogation, Rule 5(a) does not provide a basis for dismissal of the indictment because defendant cannot be said to have been prejudiced by the delay).

Trial Act provides that such individuals who are charged with crimes must proceed to trial no sooner than thirty days, and no later than seventy days, after their arraignment.[14] Individuals charged by complaint must, as a general rule, be indicted within 30 days of their arrest.[15] The statute also governs the computation of time within which a trial must commence, providing exclusions of time on various grounds, and provides for dismissal of indictments or informations for a failure to commence trial within the statutory time limits.[16] Under the law, individuals subject to pretrial detention are required to be brought to trial within ninety days of their detention.[17] However, due to the law's various exclusion of time provisions, it is not unusual for individuals to be detained for many months, and even years, before their trials begin. For purposes of the Speedy Trial Act, a trial commences at the beginning of *voir dire*.[18] The factors used to determine whether violations of the speedy trial rules should result in dismissal of charges with or without prejudice include the seriousness of the offense, the facts and circumstances of the case which lead to the dismissal, and the impact of re-prosecution on the administration of the Speedy Trial Act and on the administration of justice.[19]

A final area of difference between the two systems concerns review of the pretrial confinement determination. Under R.C.M. 305, judicial review of pretrial confinement decisions currently cannot take place until after charges have been referred for trial. In the federal civilian system, when individuals are arrested for a "probable cause" arrest (in other words, an arrest made before a criminal complaint is filed), the Supreme Court has required that a judicial officer make a probable cause determination regarding that arrest within forty-eight hours.[20] When probable cause arrests occur over the weekend or holidays this can be accomplished by presenting the facts to a judicial officer who then makes a probable cause determination rather than by a formal 'in-person' presentation of the defendant for an initial appearance under Fed. R. Crim. P. 5.[21] If probable cause has already been established as a matter of law, such as with an indictment, then no additional

[14] 18 U.S.C. § 3161(b).

[15] *Id*.

[16] 18 U.S.C. §§ 3161(h)-3162.

[17] 18 U.S.C. § 3164(b).

[18] United States v. Gonzalez, 671 F.2d 441 (11th Cir. 1982), cert. denied, 456 U.S. 994 (1982); *see also* United States v. Crane, 776 F.2d 600, 603 (6th Cir. 1985) (a trial court may not evade the Act by beginning *voir dire* within the 70-day limit and then entering a long recess before the jury is sworn in and the rest of the trial goes forward).

[19] 18 U.S.C. § 3162(a)(1).

[20] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

[21] FED. R. CRIM. P. 4.1; *see* United States v. Bueno-Vargas, 383 F.3d 1104 (9th Cir. 2004) (Customs agent's statement of probable cause to detain arrested person pending further proceedings, made under penalty of perjury and sent to a magistrate judge by facsimile, satisfied Fourth Amendment's requirement of an oath or affirmation).

probable cause determination prior to the initial appearance is required.[22] When individuals are arrested upon a criminal complaint, they have a right to a preliminary hearing to determine probable cause within fourteen days of their initial appearance if they remain in custody, or within twenty-one days if they have been released.[23] If an indictment is returned before the preliminary hearing then probable cause has been established and the hearing is automatically waived.[24] At the preliminary hearing, defendants have the right to present evidence and to cross-examine witnesses, but they may not seek to suppress evidence.[25] If the magistrate judge finds that probable cause is lacking, he is required to dismiss the complaint (without prejudice) and discharge the defendant.[26]

6. Recommendation and Justification

Recommendation 10: Amend Article 10 to conform the language of the statute to current practice and related statutory provisions, and to incorporate the forwarding requirement under Article 33. Specifically, divide the article into two subsections. Subsection (a) would provide that any person charged with an offense under the UCMJ "may be ordered into arrest or confinement as the circumstances require," except when they are charged with an offense that is normally tried by summary court-martial. Subsection (b) would require that, when a person is ordered into arrest or confinement before trial, immediate steps shall be taken to inform the person of the specific offense of which the person is accused and to try the person or dismiss the charges and release the person, and would incorporate Article 33's requirement to forward the charges and specifications and, when applicable, the Article 32 preliminary hearing report.

- This proposal would conform Article 10 to current practice, in which persons charged with offenses are ordered into confinement only as the circumstances require.
- The proposed amendments also would align the language of Article 10 more closely with related statutory provisions and other changes proposed in this Report.
- By moving the provision concerning forwarding of charges from Article 33 to Article 10, the proposed changes would facilitate expeditious processing of all cases involving pretrial confinement rather than just those expected to be referred to a general court-martial. This change also would replace the eight-day forwarding requirement under Article 33 with time frames established in the Manual for Courts-Martial that would reflect contemporary considerations regarding current

[22] *See* Kalina v. Fletcher, 522 U.S. 118, 129 (1997) (the Fourth Amendment's probable cause requirement is satisfied by an indictment returned by a grand jury).

[23] FED. R. CRIM. P. 5.1(a)-(c).

[24] FED. R. CRIM. P. 5.1(a)(2).

[25] FED. R. CRIM. P. 5.1(e).

[26] FED. R. CRIM. P. 5.1(f).

processing times in courts-martial cases while preserving the requirement to promptly forward the charges and the preliminary hearing report.

- Part II of the Report will consider whether any changes are needed in the rules implementing Article 10, with particular emphasis on judicial review of pretrial confinement decisions under R.C.M. 305 and the requirements for prompt disposition of offenses under R.C.M. 707 (Speedy trial).

7. Relationship to Objectives and Related Provisions

- This proposal would support the GC Terms of Reference by incorporating, insofar as practicable, practices and procedures used in U.S. district court into military justice practice in the area of pretrial confinement review.
- This proposal is related to this Report's proposal to empower military judges and military magistrates to exercise judicial review functions before referral of charges to courts-martial, including with respect to pretrial confinement decisions.

8. Legislative Proposal

SEC. 201. RESTRAINT OF PERSONS CHARGED.

Section 810 of title 10, United States Code (article 10 of the Uniform Code of Military Justice), is amended to read as follows:

"§810. Art. 10. Restraint of persons charged

"(a) IN GENERAL.—(1) Subject to paragraph (2), any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require.

"(2) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

"(b) NOTIFICATION TO ACCUSED AND RELATED PROCEDURES.—(1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken—

"(A) to inform the person of the specific offense of which the person is accused; and

"(B) to try the person or to dismiss the charges and release the person.

"(2) To facilitate compliance with paragraph (1), the President shall prescribe regulations setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if applicable, the preliminary hearing report submitted under section 832 of this title (article 32).".

9. Sectional Analysis

Section 201 would amend Article 10 to conform the language of the statute to current practice and related statutory provisions concerning restraint of persons charged with offenses and the actions that must be taken by military commanders and convening authorities when persons subject to the Code are held for trial by court-martial. The amendments would clarify the general provisions concerning restraint under Article 10, and would incorporate into Article 10 the requirement under Article 33 for prompt forwarding of charges in cases involving pretrial confinement. The amendments would expand the requirement for prompt forwarding to cover special courts-martial as well as general courts-martial, and would require the establishment of prompt processing timeframes in the Manual for Courts-Martial. Implementing rules would address pre-referral review of confinement orders by military magistrates and military judges under the proposed Article 30a, as well as the requirements for prompt disposition of offenses by military commanders and convening authorities.

Article 11 – Reports and Receiving of Prisoners
10 U.S.C. § 811

1. Summary of Proposal

This Report recommends no change to Article 11. Part II of the Report will consider whether any changes are needed in the rules implementing Article 11.

2. Summary of the Current Statute

Article 11 provides that a confinement officer may not refuse to accept or keep a prisoner when provided with a signed statement by a commissioned officer detailing the offense alleged against the prisoner. Article 11 further requires that the confinement officer report within twenty-four hours to the prisoner's commanding officer the name of the prisoner, the offense alleged against him, and the name of the person who ordered the confinement.

3. Historical Background

Article 11 was based on a consolidation of two offenses within the Articles of War: Article 71 (Refusal to Receive and Keep Prisoners); and Article 72 (Report of Prisoners Received).[1] Article 11 was designed to be a reiteration of the law in force at the time, and to supplement punitive articles 95, 96, and 97, which address unlawful incarceration and unlawful release of prisoners under the UCMJ.[2] The drafters considered addressing the subject matter covered by Article 11 in regulations only, but ultimately opted to enact Article 11 to avoid the perception that "it [was] dropped [because] it was no longer necessary."[3] Article 11 has not been amended since the UCMJ's enactment in 1950.[4]

Few reported appellate cases have addressed Article 11 since its enactment. The most direct analysis was provided in *United States v. Espinosa*, where the Navy Court of Military Review found that Article 11's requirement of a report within twenty-four hours to the prisoner's commanding officer was consistent with the due process requirements articulated by the Supreme Court in *Gerstein v. Pugh*.[5] The court noted that the chief intent of Article 11's precursors in the Articles of War was evidently "to preclude the unreasonable detention without trial of the prisoners committed daily to the guard-house

[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 912-913 (1949).

[2] *Id.* at 913.

[3] *Id*.

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] United States v. Espinosa, 2 M.J. 1198, 1200-01 (N.C.M.R. 1976) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

at post, etc., and to secure them a prompt trial by bringing the cases, every twenty-four hours, (or at other brief regular periods,) to the attention of the commanding officer, who, upon examination of the facts reported, may determine then and there, so far as in his power, whether the parties shall be tried or released."[6]

4. Contemporary Practice

The President has implemented Article 11(b) through R.C.M. 305(h)(1). The rule closely follows Article 11(b), except that terms used in Article 11 such as "provost marshal" and "master at arms" are replaced with the more general term "commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed."

5. Relationship to Federal Civilian Practice

The closest federal civilian corollary to Article 11 is Fed. R. Crim. P. 5(a)(1), which requires that an arresting officer bring the arrestee before a state or federal judicial officer for an initial appearance "without unnecessary delay" (unless a statute provides otherwise).[7]

6. Recommendation and Justification

Recommendation 11: No change to Article 11.

- The language in R.C.M. 305(h)(1) has been updated to accurately reflect terminology used to describe current practice in confinement facilities. Although the language of the statute has not been updated, the current statutory provision fully addresses its intended purpose.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 11's substantive provisions, no change is warranted.

[6] *Espinosa*, 2 M.J. at 1200 (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 128 (1920 reprint) (2d ed. 1896)).

[7] Federal civilian courts address violations of "unnecessary delay" by applying an exclusionary rule to statements obtained from an accused whose initial appearance before a magistrate judge under FED. R. CRIM. P. 5(a)(1) is "unreasonably delayed." *See* Corley v. United States, 556 U.S. 303, 322-23 (2009) (discussing 18 U.S.C. § 3501(c) (permitting admission of defendant's statements to law enforcement obtained within six hours of arrest, absent unreasonable delay in effecting the FED. R. CRIM. P. 5(a)(1) initial appearance)).

Article 12 – Confinement with Enemy Prisoners Prohibited
10 U.S.C. § 812

1. Summary of Proposal

This proposal would amend Article 12 by limiting the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war.

2. Summary of the Current Statute

Article 12 provides that no member of the armed forces may be placed in confinement in "immediate association" with enemy prisoners or other foreign nationals who are not members of the armed forces.

3. Historical Background

Article 12 was derived from Article 16 of the Articles of War.[1] The specific language included in Article 12 reflected Congressional concern over confining American servicemembers with foreign prisoners of war.[2] The inclusion of the phrase "in immediate association with" in the statute was intended to permit confinement of military members with enemy prisoners and foreign nationals within the same confinement facility, including overseas facilities, but to require segregation between such prisoners and military members within the facility.[3]

In recent decades, the services have closed a number of military confinement facilities in the United States, particularly those at smaller bases and in other areas with low concentrations of active duty servicemembers.[4] These closures have resulted in an increasing number of cooperation agreements between the services and federal, state, and local authorities to allow sentenced military members to be held at civilian confinement facilities, in association with civilian prisoners. Although these facilities rarely house "enemy prisoners," they frequently house foreign nationals who are not members of the armed forces. Despite these changes in military confinement practices, however, the

[1] Article 16 only applied outside the Continental United States. Article 12 of the UCMJ is not subject to geographic limitation. *See* AW 16 of 1948; *see also* MCM 1949, Chapter V, ¶19a.

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 914-15 (1949).

[3] *Id.*

[4] *See generally* DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION REPORT (2005).

prohibition on confinement with enemy prisoners and "other foreign nationals not members of the armed forces" under Article 12 has remained unchanged since the UCMJ was enacted in 1950.[5]

4. Contemporary Practice

The President has implemented Article 12 through R.C.M. 1113(e)(2)(C), which repeats the statutory prohibitions in the context of general rules and procedures concerning confinement of servicemembers.[6] Article 12 and the rules implementing the statute apply to all situations in which a convicted servicemember is housed in "immediate association" with a non-U.S. citizen, regardless of whether the non-citizen is an enemy foreign national.[7] In civilian confinement facilities where there are no readily available methods for identifying which prisoners are foreign nationals, this strict prohibition has resulted in military members being confined in total isolation.[8]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 12 in federal civilian practice.

6. Recommendation and Justification

Recommendation 12: Amend Article 12 to limit the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war.

- This change would address situations where military members are incarcerated in civilian confinement facilities pursuant to an agreement with the armed forces. The proposed amendment would clarify that this is not the type of situation Article 12 was designed to address as it does not involve confinement in close association with enemy prisoners or unlawful combatants/detainees.

- This proposed amendment retains the prohibition on confining military members in immediate association with enemy prisoners.

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] R.C.M. 1113(e)(2)(C); *see also* R.C.M. 305(a) (Discussion); DEP'T OF DEFENSE DIRECTIVE 1325.04, *Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities*, ¶4.3 (17 August 2001) (Certified Current as of 23 April 2007).

[7] *See, e.g.*, United States v. McPherson, 73 M.J. 393, 396 (C.A.A.F. 2014) (quoting United States v. Bartlett, 66 M.J. 426, 428 (C.A.A.F. 2008)); United States v. Wilson, 73 M.J. 529, 532 (A.F. Ct. Crim. App. 2014).

[8] *See, e.g.*, United States v. Wilson, 73 M.J. 404 (C.A.A.F. 2014) (Article 12 not violated where servicemember was confined alone to avoid association with foreign nationals where confinement facility had no methodology for determining which prisoners were foreign nationals).

7. Relationship to Objectives and Related Provisions

- This proposal is a stand-alone recommendation.

8. Legislative Proposal

SEC. 202. MODIFICATION OF PROHIBITION OF CONFINEMENT OF ARMED FORCES MEMBERS WITH ENEMY PRISONERS AND CERTAIN OTHERS.

Section 812 of title 10, United States Code (article 12 of the Uniform Code of Military Justice), is amended to read as follows:

"§812. Art. 12. Prohibition of confinement of armed forces members with enemy prisoners and certain others

"No member of the armed forces may be placed in confinement in immediate association with—

"(1) enemy prisoners; or

"(2) other individuals—

"(A) who are detained under the law of war and are foreign nationals; and

"(B) who are not members of the armed forces.".

9. Sectional Analysis

Section 202 would amend Article 12 to limit the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. Under current law, it is a violation of Article 12 if a military member is held in "immediate association" with enemy prisoners or foreign nationals who are not members of the armed forces. Under current practice, however, it is not uncommon for non-U.S. citizens to be held in the same civilian

confinement facilities where our military members are held during periods of pretrial or post-trial confinement. This practice was not anticipated by the drafters of the UCMJ in 1949. The proposed amendment to Article 12 would maintain the current strict prohibition against confining military members in immediate association with enemy prisoners of war, while clarifying that the restrictions in Article 12 relating to confinement of military member with "foreign nationals" are limited to situations in which the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. This change would ease the administrative burden placed on civilian confinement facilities that hold confined military members, and would prevent military members in these facilities from being isolated unnecessarily.

Article 13 – Punishment Prohibited Before Trial
10 U.S.C. § 813

1. Summary of Proposal

This Report recommends no change to Article 13. Part II of the Report will consider whether any changes are needed in the rules implementing Article 13.

2. Summary of the Current Statute

Article 13 provides that no person may be subjected to punishment pending trial. The statute clarifies that this does not prohibit pretrial arrest or confinement provided that the conditions of arrest or confinement may not be any more rigorous than necessary to ensure the person's presence at trial. Article 13 also does not prohibit minor punishment during any period of confinement for disciplinary infractions.

3. Historical Background

Article 13 was based on Article 16 of the Articles of War, and adopted the practices of the Army and Navy concerning the rigor of pretrial confinement or arrest.[1] In Article 13, the drafters of the UCMJ removed the ambiguities that had been present in the Articles of War, and clarified the relationship of Article 13 with the effective date of sentences (Article 57).[2] Prior to this change, the Articles of War had been interpreted to prohibit the enforcement of any sentence until after final approval, even though the accused was placed in confinement immediately after the sentence was adjudged.[3] In 1981, the reference to Article 57 was stricken to "clarify the distinction between the so-called un-sentenced and sentenced prisoner so that after trial, regardless of whether the sentence had been executed upon appellate review, post-trial confinees could be administered under similar programs."[4] The statute has remained unchanged since that time.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 916 (1949) [hereinafter *Hearings on H.R. 2498*]; H.R. REP. No. 81-491, at 14 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 ("Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him . . .") *amended by* Pub. L. 97-81, § 3, 95 Stat. 1085 (1981); *see Hearings on H.R. 2498*, *supra* note 1, at 818.

[3] *Id.* at 916.

[4] H.R. REP. NO. 97-306, at 5 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1769, 1773; *see* Act of Nov. 20, 1981, Pub. L. No. 97-81, 95 Stat. 1087.

4. Contemporary Practice

Article 13 prohibits two types of activities: (1) intentionally imposing punishment on an accused before a finding of guilt has been adjudged at trial (illegal pretrial punishment);[5] and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial (illegal pretrial confinement).[6] The commingling of pretrial and sentenced prisoners may violate Article 13 if it is intended to punish the prisoner or is unrelated to any legitimate government purpose.[7] An accused subjected to illegal pretrial punishment or confinement under Article 13 is entitled to "meaningful" sentence relief.[8]

5. Relationship to Federal Civilian Practice

There is no statutory equivalent to Article 13 in federal civilian practice. Federal courts have, however, held that punishment prior to trial is a violation of the due process clause of the Fourteenth Amendment.[9]

6. Recommendation and Justification

Recommendation 13: No change to Article 13.

- In view of the well-developed case law addressing Article 13's provisions, a statutory change is not necessary. Part II of the Report will consider whether any changes are needed in the rules implementing Article 13.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.
- This proposal supports MJRG Operational Guidance by preserving a unique feature of the military justice system that helps to counterbalance the limitation of rights available to members of the armed forces.

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[5] *See* United States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997) ("Article 13 prohibits the imposition of punishment or penalty prior to trial. Such an imposition entails a purpose or intent to punish an accused before guilt or innocence has been adjudicated.") (citation omitted).

[6] *See* United States v. Fischer, 61 M.J. 415 (2005) (termination of accused's pay during pretrial confinement after his period of obligated service expired did not constitute illegal pretrial punishment).

[7] *See* United States v. Palmiter, 20 M.J. 90, 94-95 (C.M.A. 1985) (citations omitted).

[8] *See* United States v. Harris, 66 M.J. 166, 169 (C.A.A.F. 2008) (noting that while Article 13 violations require "meaningful relief" an accused is not entitled to additional sentencing relief *per se* when confinement credit exceeds confinement adjudged and approved at trial; holding that setting aside accused's punitive discharge would be "disproportionate" when confinement credit exceeded approved confinement by 186 days).

[9] *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); Dodds v. Richardson, 614 F.3d 1185, 1192–1193 (10th Cir. 2010).

Article 14 – Delivery of Offenders to Civil Authorities

10 U.S.C. § 814

1. Summary of Proposal

This Report recommends no change to Article 14. Part II of the Report will consider whether any changes are needed in the rules implementing Article 14.

2. Summary of the Current Statute

Article 14 concerns the delivery of military offenders to civil authorities. The article is divided into two subsections. Article 14(a) provides that, in accordance with service regulations, a member of the armed forces accused of an offense against civil authority may, upon request, be delivered to the civil authority for trial, subject to being returned into military custody if the sentence of a court-martial is interrupted. This is a permissive authority only.[1] Article 14(b) provides that when a member of the armed forces who is undergoing sentence of a court-martial is delivered to civil authorities, such delivery interrupts the execution of any court-martial sentence; and that the civil authorities must, upon request of competent military authority, return the member to military control. This provision "encourages cooperation between military and civil authorities when a sentenced servicemember in military custody also is suspected of having committed criminal offenses amenable to civilian prosecution. As a result of Article 14(b) . . . if civil authorities subsequently try, convict, and sentence to confinement the servicemember, the two sentences, in effect, will run consecutively."[2]

3. Historical Background

Under Army practice prior to the enactment of the UCMJ, commanders were required, upon request, to turn a military member accused of a civil crime over to civilian authorities, except in a time of war. This practice was adopted before the Army had authority to try its personnel for civil offenses in time of peace, and was originally enacted in the Articles of War.[3] Under Navy practice, on the other hand, commanders exercised broad discretion with respect to the delivery of enlisted personnel to civilian authorities. Article 14 was based on the Navy practice.[4]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 921 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] United States v. Willenbring, 56 M.J. 671, 681 (A. Ct. Crim. App. 2001).

[3] AW 74 of 1920; *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 39 (1951).

[4] *Hearings on H.R. 2498*, *supra* note 1, at 921.

In 1988, Congress required the Secretary of Defense to ensure that the Service Secretaries issued uniform regulations to provide for the delivery of members of the armed forces to civilian authority when such members have been accused of offenses against civil authority.[5]

4. Contemporary Practice

The President has implemented Article 14(a) through R.C.M. 106 and Article 14(b) through R.C.M. 1113(e)(2)(A)(ii). The rules only apply to delivery of military members to authorities of the United States or its political subdivisions. Delivery of a military member to a foreign government for trial is ordinarily covered by status of forces agreements.[6] Each of the services has regulations outlining the procedures for delivery of a military member to civilian authorities.

There has been very little case law concerning Article 14 since the UCMJ's adoption, and the few cases which have dealt with its provisions have affirmed the statute's continued relevance and authority.[7]

5. Relationship to Federal Civilian Practice

Article 14 has no corresponding rule in federal civilian practice.

6. Recommendation and Justification

Recommendation 14: No change to Article 14.

- In view of the well-developed case law addressing Article 14's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 14.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by preserving a unique feature of the military justice system that supports military discipline while ensuring appropriate coordination with civilian authorities.

[5] NDAA FY 1989, Pub. L. No. 100-456, § 721, 102 Stat. 1918 (1988).

[6] MCM, App. 21 (R.C.M. 106, Analysis).

[7] *See, e.g.*, United States v. Duncan, 34 M.J. 1232 (A.C.M.R. 1992), *aff'd* 38 M.J. 496 (C.M.A. 1993) (under Article 14, authority of Department of Justice does not extend beyond right to request that military surrender soldier for trial in civilian court).

Subchapter III. Non-Judicial Punishment

Article 15 – Commanding Officer's Non-judicial Punishment
10 U.S.C. § 815

1. Summary of Proposal

This proposal would retain the wide range of punishments available to commanders to address misconduct through non-judicial proceedings under Article 15, while precluding punishment in the form of confinement on a diet consisting only of bread and water. Part II of the Report will consider whether any changes are needed in the rules implementing Article 15.

2. Summary of the Current Statute

Article 15 provides commanders with a range of disciplinary measures for minor offenses in order to promote good order and discipline in the armed forces and correct deficiencies in servicemembers without the stigma of a court-martial conviction. Article 15 is implemented through detailed regulations proscribed by the President in Chapter V of the MCM, and through service-specific regulations. Members may request a trial by court-martial in lieu of non-judicial punishment except when attached to or embarked on board a vessel.

Under the current statute, the punishments authorized by Congress include: reduction to the lowest pay grade; confinement on bread and water or diminished rations for three days when attached or embarked on a vessel; correctional custody for 30 days; restriction for 60 days; arrest in quarters for 30 days; extra duties for 45 days; forfeitures of one-half of one month's pay for three months; and detention of one-half of one month's pay for two months. The scope of these punishments may vary depending upon the grade of the member and that of the imposing authority. Rank reduction, confinement on bread and water, correctional custody, extra duties, and restriction may only be imposed against enlisted members. Arrest in quarters is limited to officers.

3. Historical Background

From the earliest days of our nation, commanders have had the authority to impose disciplinary punishments through a variety of formal and informal procedures.[1] Congress

[1] The ability of commanders to summarily punish sailors for minor offenses has origins in the earliest naval regulations, and for troops, in regulations and practices promulgated during the Revolutionary War. While the ability of a ship's captain to impose punishment was well-established by naval tradition, field commanders routinely complained of challenges with disciplining their troops, and would often exercise general orders in order to fill the legislative gaps where discipline was not expressly authorized. *See generally* Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 (1965).

codified the ability of a company commander to impose disciplinary punishment in Article 104 of the 1916 Articles of War.[2] This provision served as the foundation for Article 15 when the UCMJ was enacted in 1950.[3] In 1962, Congress amended Article 15 with a view towards reducing the number of courts-martial for minor offenses.[4]

4. Contemporary Practice

Non-judicial punishment is governed by Article 15, Part V of the Manual for Courts-Martial, and service-specific regulations. Article 15 provides substantial discretion to the services in structuring non-judicial punishment proceedings. Although similar in terms of purpose—efficient and direct disposition of minor offenses—service regulations and cultures have created essentially five different variations of this administrative forum, under a variety of different names: "Captain's Mast" (Navy and Coast Guard); "Office Hours" (Marine Corps); "Article 15" (Air Force and Army); or just "NJP" (a commonly used term). The services apply three different standards of proof during Article 15 proceedings: the Army applies a beyond a reasonable doubt standard, just as in courts-martial; the Navy, Marine Corps, and Coast Guard use a preponderance of the evidence standard, recognizing the non-criminal nature of the proceeding; and the Air Force has no established regulatory standard of evidence for non-judicial punishment.[5] The statutorily authorized "vessel exception," which precludes a member attached or embarked on a vessel from demanding a court-martial in lieu of non-judicial punishment proceedings, is utilized primarily by the Sea Services.[6] The Army's Article 15 regulations provide commanders with options with respect to whether non-judicial punishment records are filed locally or permanently, depending on the rank of the member and the nature of the offense.[7]

5. Relationship to Federal Civilian Practice

Non-judicial punishment does not have a direct civilian equivalent. Although civilian employees are subject to a variety of administrative disciplinary matters, the range of punishments available under Article 15 and the service-specific procedures and rules that implement the statute are unique to military service.

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[2] AW 104 of 1916.

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 923-955 (1949).

[4] Act of Sept. 7, 1962, Pub. L. No. 87-648, § 1, 76 Stat. 447-450; *see Hearings on H.R. 7656 Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 4903 (1962); Miller, *supra*, note 1, at 37.

[5] *See* AIR FORCE INSTR. 51-202 (Air Force regulation governing non-judicial punishment); ARMY REG. 27-10 (Army regulation governing non-judicial punishment); COMMANDANT INSTR. M5810.E (Coast Guard regulation governing non-judicial punishment); and JAGINST. 5800.7F (Navy-USMC regulation governing non-judicial punishment).

[6] *Id.* (confinement on bread and water or diminished rations is not authorized by the Coast Guard). *See generally* Dwight H. Sullivan, *Overhauling the Vessel Exception*, 45 NAVAL L. REV. 57 (1996).

[7] *See* ARMY REG. 27-10 (filing determinations provided under 3-6).

6. Recommendation and Justification

Recommendation 15: Amend Article 15 to remove punishment in the form of confinement on a diet limited to bread and water from the list of authorized punishments.

- This proposal reflects confidence in the ability of commanders in a modern era to administer effective discipline through the utilization of the wide range of punishments otherwise available under Article 15 and other non-punitive measures.
- Part II of this Report will consider: (1) whether a uniform burden of proof can be adopted in Part V of the Manual to promote greater consistency in non-judicial punishment proceedings; (2) whether to enhance options for the services to administer low-level NJP for minor disciplinary infractions without necessarily triggering permanent adverse administrative consequences; and (3) whether to clarify the circumstances qualifying for the "vessel exception."

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.
- The recommendation to retain Article 15 largely in its current form reflects a recognition that NJP effectively promotes good order and discipline at the unit level, and is essential to the effective administration of military justice in the armed forces.

8. Legislative Proposal

SEC. 301. MODIFICATION OF CONFINEMENT AS NON-JUDICIAL PUNISHMENT.

Section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b)—

(A) in paragraph (2)(A), by striking "on bread and water or diminished rations"; and

(B) in the undesignated matter after paragraph (2), by striking "on bread and water or diminished rations" in the sentence beginning "No two or more"; and

(2) in subsection (d), by striking "on bread and water or diminished rations" in paragraphs (2) and (3)."

9. Sectional Analysis

Section 301 contains amendments concerning non-judicial punishment under Article 15. Non-judicial punishment under Article 15 provides commanders with a range of disciplinary measures for minor offenses to promote good order and discipline in the armed forces and correct deficiencies in servicemembers without the stigma of a court-martial conviction. Article 15, as amended, would retain the wide range of punishments available to commanders to address misconduct through non-judicial proceedings, while precluding punishment in the form of a diet consisting only of bread and water. Implementing rules would address several issues concerning the administration of non-judicial punishment under Article 15, including the standard of evidence at non-judicial punishment proceedings, the administrative consequences of non-judicial punishment for minor disciplinary offenses, and the circumstances qualifying for the "vessel exception."

Subchapter IV. Court-Martial Jurisdiction

Article 16 – Courts-Martial Classified
10 U.S.C. § 816

1. Summary of Proposal

This proposal would establish standard sized panels in non-capital courts-martial: eight members in a general court-martial, and four members in a special court-martial. As provided in Article 25a, a general court-martial in a capital case would have a panel of twelve members. Reflecting longstanding practice, the proposal would require a military judge at all special courts-martial. The proposed amendments would continue the authority for judge-alone trials in non-capital cases at the request of the accused. Consistent with the constitutional authority to authorize civilian non-jury trials without obtaining a defendant's consent in cases involving confinement for six months or less, the proposal also would provide the military justice system with similar discretionary authority for referral to a judge-alone special court-martial, in which confinement and forfeitures would be limited to six months or less and no punitive discharge would be authorized (as reflected in the proposed changes to Article 19). The authority to refer cases to the new judge-alone forum would be subject to limitations prescribed by the President. This proposal would retain the summary court-martial.

2. Summary of the Current Statute

Currently, Article 16 authorizes the following types of courts-martial: a general court-martial, consisting of a military judge and at least five members; a general court-martial authorized to adjudge the death penalty, subject to the requirements and exceptions of Article 25a, consisting of a military judge and at least 12 members; a special court-martial consisting of a military judge and at least three members; a special court-martial without a military judge, consisting of at least three members; and a summary court-martial consisting of a single commissioned officer. The current statute establishes minimum requirements for the number of members, not a fixed panel size, for general and special courts-martial. The statute also permits judge-alone general and special courts-martial at the election of the accused in non-capital cases.

3. Historical Background

Modeled after the British Articles of War, the earliest American Articles of War called for thirteen-member general courts-martial and specified that regimental courts-martial (analogous to the current special courts-martial) should convene with five members, but never fewer than three.[1] Naval courts-martial at that time impaneled at least six members, a number that was eventually reduced to three (five for capital cases). After the American

[1] AW XXXVIII of 1775. *See generally* Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 114-117 (1992).

Revolution, and in order to account for the limited-size of America's military forces, the Articles of War and Articles for the Government of the Navy adopted the practice of seating five to thirteen officers in general courts-martial, with regimental courts-martial (or "summary" courts-martial in the Navy) fixed at three members.[2] By 1920, the practice under the Articles of War was again amended by having no fewer than five members in general courts-martial and no fewer than three members in special courts-martial, a practice that has remained in place since that time.[3]

The 1920 Articles of War created the position of the law member.[4] The law member was one of the appointed court members and was seated with them.[5] As a court member, the law member had an equal vote in deciding all questions submitted to a vote or ballot of the court, including challenges, findings, sentence, and any interlocutory questions submitted to a vote of the court.[6] Although the law member made evidentiary and procedural rulings, the court members could overrule the law member, just as they could reject the advice of the prosecuting judge advocate.[7] When a court member objected to a law member's ruling, the members decided the question by a majority vote.[8] In special courts-martial, which had no appointed law member, the court president performed the role of law member by making rulings in open court.[9]

When the UCMJ was enacted in 1950, Congress replaced the law member with a "law officer."[10] The law officer was no longer one of the court members and sat apart from them during trial, usually in the front of the courtroom on a raised dais, where one would expect a judge to sit.[11] The law officer did not deliberate or vote with the members, and could not discuss the case with the members outside of the presence of the accused, except to help put the findings and sentence into proper form. Then, in 1968, Congress replaced the law officer with a military judge, aligning the judicial powers of the position roughly with the

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[2] See, e.g., AW 5, 6 of 1916; *see also* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 3-11 (1998).

[3] AW 5, 6 of 1920. Under the Articles of War, only officers could sit on court-martial panels. *See also* AGN 27, 45 of 1930 (requiring a minimum of five members for general courts-martial and three members for summary courts-martial, which were the equivalent of special courts-martial in Navy practice).

[4] AW 8 of 1920.

[5] MCM 1921, ¶83.

[6] MCM 1921, ¶89*a*.

[7] AW 31 of 1920; MCM 1921, ¶89*a*.

[8] *Id*. A secret ballot was used only on the findings.

[9] *Id*.

[10] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[11] MCM 1951, ¶61*b.*; *see also id.* at 500 (schematic of seating in general court-martial).

powers of federal civilian judges.[12] For the first time, the accused could elect trial by a military judge alone—without court members—in both general and special courts-martial.[13] The military judge's new powers included the power to release an accused from pretrial confinement, and to hold sessions outside the presence of the members at the pretrial, trial, and post-trial stages under Article 39(a).[14] In addition, before any special court-martial could adjudge a bad-conduct discharge, Congress required the appointment of a military judge and legally trained counsel for both sides.[15]

The summary court-martial, composed of a single commissioned officer, has been a codified feature of military justice practice since the late nineteenth century, and has been a disposition option for low-level offenses under the UCMJ since its enactment in 1950. Case law and practice have identified it as being distinct from the other courts-martial, as it is an administrative, non-criminal forum without the consequence of criminal liability.[16]

4. Contemporary Practice

The President has implemented Article 16 through R.C.M. 501, 502, and 503, which provide the rules and procedures concerning the composition of courts-martial and the qualifications, duties, and detailing of courts-martial personnel, including panel members. In accordance with the criteria under Article 25 and the procedures under R.C.M. 502-503, court-martial convening authorities develop a list of best-qualified members whom they detail to a particular court-martial. As a general practice, the number detailed to a court-martial will be greater than the minimum required by Article 16 in order to account for the possibility of excusals and successful challenges. Even with excusals and challenges, courts-martial frequently impanel more than the required number of members. Under current practice, the excess members cannot be returned to their units to perform their regular duties, but must continue to sit on the panel through the completion of the court-martial. As a result, the panel size can vary from case to case, even in cases involving similar charges. Because the size of the panel can vary, so can the percentage required for a conviction, anywhere from 67% (e.g., two out of three members, four out of six, six out of nine) to 80% (e.g., four out of five members).

With respect to special courts-martial without a military judge, although current law continues to provide authority for this forum, the services have a longstanding practice of assigning a military judge to every special court-martial. Summary courts-martial remain

[12] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335-36.

[13] *Id*. By 1988, about three-quarters of all trials by special and general courts were before a military judge sitting alone without court members. *See Military Justice Statistics,* the Army Lawyer, Feb. 1988 at 54. The exact figures for judge-alone cases at that time were: GCM, 71.2%; BCDSPCM, 78.4%; and SPCM, 65.8%.

[14] Military Justice Act of 1968, at 82 Stat. 1338, 1341.

[15] Military Justice Act of 1968, at 82 Stat. 1335-36.

[16] *See* Middendorf v. Henry, 425 U.S. 25 (1976). For a more detailed analysis of the evolution of the summary court-martial, see the Section in this Report analyzing Article 20.

an available forum for the disposition of minor offenses in a court-martial proceeding without a detailed military judge.

5. Relationship to Federal Civilian Practice

In federal civilian practice and state criminal practice, judges preside in all criminal proceedings, including in misdemeanor cases. Furthermore, federal juries are required to have twelve jurors in all cases, except when the defendant is charged with Class B or C misdemeanors or violations, in which case the defendant is not entitled to a jury trial.[17] Among the fifty states, Florida, Connecticut, Utah, and Arizona allow for felony-level convictions in non-capital cases by juries of fewer than twelve—with Florida and Connecticut authorizing six-person juries, and Utah and Arizona requiring an eight-person jury. However, there is no civilian jurisdiction, state or federal, that allows jury panels to fluctuate between cases depending on the size of the initial venire and the number of excusals or challenges granted. Military panels are not subject to the same general constitutional requirements as civilian juries in terms of their size.[18]

6. Recommendation and Justification

Recommendation 16.1: Amend Article 16 to establish standard panel sizes in all courts-martial: eight members in a general court-martial (subject to the requirements of Article 25a in capital cases), and four members in a special court-martial.

- The current system creates an anomaly by varying the percentage required for a conviction based upon the happenstance of the number of members who remain on the panel after challenges and excusals—a variance that can range from 67% to 80% depending on the number of members impaneled to the court-martial.

- The recommendation for a standard four-member special court-martial and a standard eight-member non-capital general court-martial—in conjunction with the change proposed in Article 52 to require a fixed percentage (75%) of votes on the findings in all cases—will eliminate this anomaly. The proposed changes would provide an appropriate number of members for group discussion and deliberation, while ensuring that the operational requirements of convening authorities are appropriately balanced.

- The proposal would address the inefficiencies that result from the current requirement for the court-martial to impanel every member detailed in excess of the required number. Although it is necessary for the convening authority to detail a number of members larger than the minimum in order to take into account the potential for challenges and excusals, the current system creates a burden on

[17] 18 U.S.C. § 3559; FED. R. CRIM. P. 58(b)(2); *see* United States v. Merrick, 459 F.2d 644 (4th Cir. 1972).

[18] *See Ex parte* Quirin, 317 U.S. 1, 17 (1942); Sanford v. United States, 586 F.3d 28, 35 (D.C. Cir. 2009); Mendrano v. Smith, 797 F.2d 1538, 1544 (10th Cir. 1986).

military effectiveness by requiring the excess members to remain on the panel rather than return to their regular duties.

- The proposed standard panel sizes for general and special courts-martial are well within the range of the number of members that currently sit in most courts-martial. The twelve-member general court-martial in capital cases is consistent with the current minimum number of members required in that forum.

- The proposed standard panel size for general courts-martial will be subject to the requirements of the proposed amendments to Article 25a, requiring a standard panel of twelve members in capital cases.

- To address excusals of members that may occur during the course of trial, the proposed amendments to Article 29 will provide the procedure for replacements, options for the use of alternate members, and the opportunity for non-capital general courts-martial to proceed with a reduced panel, but no fewer than six members.

Recommendation 16.2: Amend Article 16 to require a military judge to be detailed to all special courts-martial.

- Although the UCMJ has authorized special courts-martial to proceed without a detailed military judge (subject to restrictions on punishment), the military services have long required the presence of a military judge to preside at all special courts-martial. In the unlikely event that a disciplinary proceeding is needed to address misconduct in a situation where a judge cannot be readily assigned, a commander will continue to have the broad authority to issue non-judicial punishment under Article 15, as well as the authority to refer charges to a summary court-martial, a one-officer court without a military judge or counsel, which is empowered to impose an array of punishments, including up to thirty days of confinement.

Recommendation 16.3: Amend Article 16 to provide the military justice system with an option for a judge-alone trial special court-martial, with confinement limited to six months or less, as reflected in the proposed changes to Article 19.

- The proposed authority for referral of cases to a judge-alone special court-martial draws upon the successful experience of the military justice system with judge-alone trials since 1968. It also draws upon the experience in the federal civilian system, as well as in state courts, in which an accused defendant does not have the right to trial by jury when the confinement does not exceed six months.

- Consistent with federal civilian practice, the confinement that could be adjudged in a case referred to a judge-alone special court-martial would be six months or less; forfeitures would be capped at six months; and a punitive discharge would not be available, in accordance with the proposed changes to Article 19.

- The convening authority would have discretion, subject to such limitations that the President may prescribe by regulation, in deciding whether to refer a case to a

judge-alone special court-martial or to a traditional special court-martial empowered to adjudge up to twelve months confinement and forfeitures, as well as a punitive discharge. At the traditional special court-martial, the accused would have the same opportunity as under current law to elect a judge-alone trial or a trial with a panel of members.

- The judge-alone special court-martial will provide the convening authority with a greater range of disposition options, which may prove particularly useful when addressing cases involving a request for court-martial arising out of a non-judicial punishment or summary court-martial refusal, and in deployed environments where operational demands may make it difficult to assemble a panel to address cases involving minor misconduct.

7. Relationship to Objectives and Related Provisions

- The proposal to create a referred judge-alone special court-martial supports the GC Terms of Reference by incorporating a practice used in U.S. district courts—the judge-alone trial with a punishment cap of six months confinement (and no punitive discharge in the military context). This proposal supports MJRG Operational Guidance by promoting the first of six "key principles": discipline in the armed forces. The judge-alone special court-martial would offer military commanders a new disposition option for low-level criminal misconduct—one that would be more efficient and less burdensome on the command than a special court-martial, but without the option for the member to refuse as in summary courts-martial and non-judicial punishment.

- The proposed amendments that would require standard panel sizes in all general and special court-martial support MJRG Operational Guidance by employing the standards and procedures of the civilian sector with respect to consistency between jury/panel sizes insofar as practicable in military practice.

- In the section of this Report addressing Article 20, clarifying language has been proposed to incorporate the Supreme Court's treatment of the summary court-martial as an administrative, non-criminal forum.

8. Legislative Proposal

SEC. 401. COURTS-MARTIAL CLASSIFIED.

Section 816 of title 10, United States Code (article 16 of the Uniform Code of Military Justice), is amended to read as follows:

“§816. Art. 16. Courts-martial classified

“(a) IN GENERAL.—The three kinds of courts-martial in each of the armed forces are the following:

“(1) General courts-martial, as described in subsection (b).

“(2) Special courts-martial, as described in subsection (c).

“(3) Summary courts-martial, as described in subsection (d).

“(b) GENERAL COURTS-MARTIAL.—General courts-martial are of the following three types:

“(1) A general court-martial consisting of a military judge and eight members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

“(2) In a capital case, a general court-martial consisting of a military judge and the number of members determined under section 825a of this title (article 25a), subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

“(3) A general court-martial consisting of a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(c) SPECIAL COURTS-MARTIAL.—Special courts-martial are of the following two types:

"(1) A special court-martial, consisting of a military judge and four members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(2) A special court-martial consisting of a military judge alone—

"(A) if the case is so referred by the convening authority, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation; or

"(B) if the case is referred under paragraph (1) and, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(d) SUMMARY COURT-MARTIAL.—A summary court-martial consists of one commissioned officer.".

9. Sectional Analysis

Section 401 contains amendments concerning courts-martial classifications under Article 16 of the UCMJ. Under current law, general courts-martial consist of a military judge and not less than five members in non-capital cases, or a military judge alone upon the election of the accused. Special courts-martial consist of not less than three members, a military judge and not less than three members, or a military judge alone upon the election of the accused. Because there is a variable number of members in each case, the number of votes required for a conviction under Article 52 can fluctuate from case to case without any

guiding principle to ensure consistency. *See* Section 715, *infra* (discussing voting by the court-martial panel under Article 52). The proposed amendments seek to enhance military justice and improve the consistency of court-martial panel deliberations by establishing standard panel sizes: twelve members in capital general courts-martial, eight members in non-capital general courts-martial, and four members in special courts-martial. As amended, Article 16 would include references to Article 25a (addressing panel size in capital cases), Article 25(d) (addressing the initial detailing of members by the convening authority), and Article 29 (addressing the impaneling of members and the impact of excusals on panel composition).

Article 16(c), as amended, would require a military judge to be detailed to all special courts-martial, reflecting current military practice and similar federal and state civilian practice. The amendments also would add the option of referral to a non-jury (judge-alone) special court-martial. Such a forum is common among civilian criminal jurisdictions. *See* 18 U.S.C. § 3559; Fed. R. Crim. P. 58(b)(2); *United States v. Merrick*, 459 F.2d 644 (4th Cir. 1972). Providing commanders with this option would generate greater efficiencies in the military justice system for the adjudication of low-level, misdemeanor-equivalent offenses. As provided in the proposed amendments to Article 19, punishments at this forum could include confinement and forfeitures limited to no more than six months and would not include a punitive discharge. In addition, a military magistrate designated by the detailed military judge could preside when authorized under service regulations and with the consent of the parties. *See* Section 403, *infra.* Implementing provisions in the Manual for Courts-Martial would establish limits on the types of offenses that could be referred for trial at this forum.

Article 17 – Jurisdiction of Courts-Martial in General

10 U.S.C. § 817

1. Summary of Proposal

This Report recommends no change to Article 17. Part II of the Report will consider whether any changes are needed in the rules implementing Article 17.

2. Summary of the Current Statute

Article 17 provides that each armed force has court-martial jurisdiction over all persons subject to the UCMJ. Subsection (a) provides each armed force with court-martial jurisdiction over all persons subject to the Code and authorizes the President to prescribe regulations for jurisdiction by one armed force over the personnel of another (i.e., "reciprocal jurisdiction"). Subsection (b) provides for departmental review of cases tried by one armed force by the service of the accused.

3. Historical Background

Article 17 has not been amended since the UCMJ's enactment in 1950.[1] However, the regulatory language for reciprocal jurisdiction contained in R.C.M. 201(e) was amended in 1986 (post-Goldwater-Nichols Act) to conform the statute to the reorganization of the joint service environment.[2]

4. Contemporary Practice

The President has implemented Article 17 through R.C.M. 201(e). Under the rule, unified and specified combatant commanders are authorized to convene courts-martial over members of any service within their respective command, subject to service-specific regulations or agreements. In the event of disagreement among Service Secretaries, military departments, or combatant commanders, the Secretary of Defense or his designee designates the appropriate organization to exercise jurisdiction.[3] The rule and its guidance

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-443, tit. II, § 211(b), 100 Stat. 992.

[3] In its 2013 Final Report, the Defense Legal Policy Board's (DLPB) Subcommittee on Military Justice in Combat Zones found that, throughout the conflicts in Iraq and Afghanistan, the individual Services continued to maintain control over military justice matters related to their own personnel, despite operating in a joint environment. The Subcommittee recommended that military justice jurisdictional responsibilities be determined and prescribed during the joint-planning process. It is possible for the Services to implement the DLPB recommendations under existing statutory and regulatory authority. Part II of this Report will consider whether any regulatory changes are needed to facilitate the exercise of military justice jurisdiction over

are consistent with the original "congressional intent that reciprocal jurisdiction ordinarily not be exercised outside of joint commands or task forces, and is designed to protect the integrity of intraservice lines of authority."[4]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 17 in federal civilian practice.

6. Recommendation and Justification

Recommendation 17: No change to Article 17.

- Article 17 requires no amendments. As drafted, the statute provides all necessary authority for, and restrictions concerning, reciprocal jurisdiction.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 17.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

personnel by joint commanders in future conflicts and deployed environments. *See* DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES: MILITARY JUSTICE IN CASES OF U.S. SERVICE MEMBERS ALLEGED TO HAVE CAUSED THE DEATH, INJURY OR ABUSE OF NON-COMBATANTS IN IRAQ OR AFGHANISTAN, 4.0 *Subcommittee Findings and Recommendations*, 35 (DEP'T OF DEF. MAY 30, 2013).

[4] MCM, App. 21 (R.C.M. 201(e), Analysis) (citing *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 612-15, 957-58 (1949)).

Article 18 – Jurisdiction of General Courts-Martial
10 U.S.C. § 818

1. Summary of Proposal

This proposal would make a conforming changes to align Article 18 with the revised descriptions of the types of courts-martial under Article 16, and would specify the sexual offenses currently listed under Article 56(b)(2), over which general courts-martial have exclusive jurisdiction.

2. Summary of the Current Statute

Article 18 establishes the jurisdiction of general courts-martial over persons subject to the UCMJ, including those subject to military tribunal under the law of war. The statute authorizes general courts-martial to adjudge all punishments available under the UCMJ, including death, subject to any limitations prescribed by the President; however, it expressly prohibits judge-alone general courts-martial from exercising jurisdiction in cases where the death penalty may be awarded. Article 18(c) limits jurisdiction over the sex-related offenses listed under Article 56(b)(2).

3. Historical Background

Congress has amended Article 18 twice since the UCMJ was enacted in 1950.[1] The statute was first amended in 1968, in order to prohibit judge-alone general courts-martial in capital cases.[2] More recently, in 2013, Congress amended Article 18 by dividing the statute into three subsections and, in subsection (c), limiting jurisdiction over the sex-related offenses specified under Article 56(b)(2) to general courts-martial.[3]

4. Contemporary Practice

The President has implemented Article 18 through R.C.M. 201 (Jurisdiction in general), R.C.M. 202 (Persons subject to the jurisdiction of courts-martial), and R.C.M. 203 (Jurisdiction over the offense), which are consistent with the statutory provisions.

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 18 in federal civilian practice.

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

[3] NDAA FY 2014, Pub. L. No. 113-66, § 1705(b), 127 Stat. 672 (2013).

6. Recommendation and Justification

Recommendation 18: Amend Article to conform the statute to the proposed changes to Article 16 concerning the types of general courts-martial and the proposed changes to Article 56 concerning sex-related offenses.

- This proposal would retain current law with non-substantive conforming changes necessitated by the proposed amendments to Article 56.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.
- This recommendation supports MJRG Operational Guidance by minimizing change to an area recently revised by Congress; taking into account the importance of maintaining system balance; and maintaining a unique and necessary feature of military practice.
- This recommendation would align Article 18 with the proposed changes in Articles 16 and Article 56.

8. Legislative Proposal

SEC. 402. JURISDICTION OF GENERAL COURTS-MARTIAL.

Section 818 of title 10, United States Code (article 18 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b), by striking "section 816(1)(B) of this title (article 16(1)(B))" and inserting "section 816(b)(3) of this title (article 16(b)(3))"; and

(2) by striking subsection (c) and inserting the following:

"(c) Consistent with sections 819 and 820 of this title (articles 19 and 20), only general courts-martial have jurisdiction over the following offenses:

"(1) A violation of subsection (a) or (b) of section 920 of this title (article 120).

"(2) A violation of subsection (a) or (b) of section 920b of this title (article 120b).

"(3) An attempt to commit an offense specified in paragraph (1) or (2) that is punishable under section 880 of this title (article 80).".

9. Sectional Analysis

Section 402 would make conforming changes to Article 18 of the UCMJ to align the statute with the revised descriptions of types of courts-martial under Article 16. The amendments also would modify Article 18 to specify the sexual offenses (currently listed by cross-reference to Article 56(b)(2)) over which general courts-martial have exclusive jurisdiction. This would accommodate the proposal under Section 801, *infra*, to repeal Article 56(b) following the enactment of sentencing parameters under Article 56(d).

Article 19 – Jurisdiction of Special Courts-Martial
10 U.S.C. § 819

1. Summary of Proposal

This proposal would provide conforming changes in Article 19, which sets forth the requirements for a special court-martial, in light of: (1) the proposed changes in Article 16 that provide an option to refer cases to a judge-alone special court-martial; (2) the proposed changes in Article 27 regarding the requirement to detail defense counsel for both general and special courts-martial; and (3) the proposed changes in Article 54 regarding the preparation of records for all courts-martial. The proposed amendments also would amend Article 19 to codify current practice by requiring a military judge to be detailed to every special court-martial, and would allow military judges to designate military magistrates, if available, to preside over special courts-martial referred judge-alone, with the consent of the parties.

2. Summary of the Current Statute

Article 19 concerns the jurisdiction of special courts-martial. Under this section, the maximum punishment for any case tried by special court-martial is confinement for one year, forfeiture of two-thirds pay per month for one year, hard labor without confinement for not more than three months, reduction to the lowest pay grade (E-1), and a bad-conduct discharge. A special court-martial may not adjudge a bad-conduct discharge, more than six months confinement, or forfeiture of two-thirds pay per month for more than six months unless there is a "complete record" of the proceedings, a qualified defense counsel is detailed to represent the accused, and a military judge presides at trial.

3. Historical Background

When Congress enacted the UCMJ in 1950,[1] it based Article 19 on Article 13 of the Articles of War.[2] The statute's legislative history reflects a congressional intent to prohibit trial at a special court-martial of any offense for which a mandatory punishment was prescribed by the UCMJ.[3] The provision in Article 19 allowing capital offenses to be tried at a special court-martial, minus the authority to adjudge the death penalty, was adopted at the urging of the Navy in order to retain the option of trying such cases aboard ship, because prompt

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] S. REP. No. 81-486, at 13 (1949).

[3] *Id.*; *see* AW 19 of 1948.

disciplinary action might be needed in circumstances where it would be impractical to refer such a case to a general court-martial convening authority.[4]

The Military Justice Act of 1968 amended Article 19 to provide that a bad-conduct discharge could not be adjudged at a special court-martial unless legally qualified defense counsel was appointed to represent the accused, a military judge was detailed to the trial, and a complete record of the proceedings was made.[5] In 1999, Congress again amended Article 19 to revise the maximum punishment authorized at special courts-martial by increasing the maximum period of authorized confinement and forfeitures from six months to one year.[6] In 2014, Congress amended Article 56 and Article 18 to require certain rape and sexual assault offenses to be tried only at general courts-martial, precluding convening authorities from referring these charges to special courts-martial.[7]

4. Contemporary Practice

Special courts-martial are typically used to try unique military disciplinary offenses and other minor offenses. The provision in Article 19 for special court-martial cases to be tried without a judge is not a part of contemporary practice. Under established practice in all services, virtually all special courts-martial are conducted with a military judge, and defense counsel qualified under Article 27(b).

5. Relationship to Federal Civilian Practice

The Supreme Court has held that the Sixth Amendment right to a jury does not apply to trials of petty offense crimes (i.e., those punishable by not more than six months confinement).[8] State courts generally do not provide jury trials when adjudicating petty offenses, and federal courts do not provide jury trials for petty offenses.[9] In federal civilian courts, magistrate judges typically preside over the initial appearance, arraignment and trial of all petty offenses.[10] The parties may appeal a ruling of a magistrate judge to a district court judge within fourteen days of its entry.[11]

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[4] *Id*.

[5] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335-36 (allowing an exception to the requirement for a military judge because of physical conditions or military exigencies, if the convening authority makes a detailed written statement, appended to the record, of the reasons a military judge could not be detailed).

[6] NDAA FY 2000, Pub. L. No. 106-65, § 577(a)(1) and (a)(2), 113 Stat. 512 (1999).

[7] NDAA FY 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013).

[8] Baldwin v. New York, 399 U.S. 66, 73 (1970) (noting that any disadvantage to an accused facing up to six months imprisonment "may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications").

[9] FED. R. CRIM. P. 58(b)(2)(F).

[10] FED. R. CRIM. P. 58(b)(2) and 58(b)(3).

[11] FED. R. CRIM. P. 58(g)(2)(A) and 58(g)(2)(B).

6. Recommendation and Justification

Recommendation 19.1: Amend Article 19 to conform to the proposal in Article 16 to allow special courts-martial to be referred judge-alone, with authority for a military judge to designate a military magistrate to preside over these cases as well.

- This proposal would conform the requirements and jurisdictional limits of special courts-martial to include the specific option for charges to be referred to a special court-martial consisting of a military judge-alone, as proposed in Article 16, subject to the additional limitation on sentence. A military magistrate would be authorized to preside over the special court-martial referred judge-alone, if designated by the military judge, with the consent of the parties.
- As with other special courts-martial, appellate review would be available for this forum under the proposed amendments to Articles 66 and 69.

Recommendation 19.2: Amend Article 19 to conform to current practice requiring a military judge, qualified defense counsel, and a record at every special court-martial.

- This proposal would clarify the requirement for every special court-martial to have a military judge, qualified defense counsel, and a complete record, consistent with current practice and the statutory requirements in Article 27 and Article 54.

7. Relationship to Objectives and Related Provisions

- This proposal reflects federal civilian practice in allowing a magistrate to preside over cases that adjudicate petty offense level charges.

8. Legislative Proposal

SEC. 403. JURISDICTION OF SPECIAL COURTS-MARTIAL.

Section 819 of title 10, United States Code (article 19 of the Uniform Code of Military Justice), is amended—

(1) by striking "Subject to" in the first sentence and inserting the following:

"(a) IN GENERAL.—Subject to";

(2) by striking "A bad-conduct discharge" and all that follows through the end; and

(3) by adding after subsection (a), as designated by paragraph (1), the following new subsections:

"(b) ADDITIONAL LIMITATION.—Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)).

"(c) MILITARY MAGISTRATE.—If charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)), the military judge, with the consent of the parties, may designate a military magistrate to preside over the special court-martial.".

9. Sectional Analysis

Section 403 would amend Article 19 to align the statute with proposed changes in Article 16 regarding the composition of special courts-martial. *See* Section 401, *supra.*

Article 20 – Jurisdiction of Summary Courts-Martial

10 U.S.C. § 820

1. Summary of Proposal

This proposal would amend Article 20 to incorporate Supreme Court case law identifying the summary court-martial as a non-criminal forum. Part II of the Report will consider whether any changes are needed in the rules implementing Article 20.

2. Summary of the Current Statute

Article 20 provides the jurisdictional limits of summary courts-martial, including who may be tried by summary courts-martial and the maximum punishments that may be adjudged by summary courts-martial. Under the statute, summary courts-martial have jurisdiction to try all persons subject to the Code except officers, cadets, aviation cadets, and midshipmen. They may not try persons for capital offenses, and they may not adjudge punishments of death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of 30 days, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay. Article 20 further provides that no person may be tried by summary court-martial over his or her objection. Any refusal to submit to trial by summary court-martial permits a convening authority to bring the charges to a special or general court-martial at the convening authority's discretion. The UCMJ does not provide a right to counsel at summary courts-martial.[1]

3. Historical Background

Military commanders have long exercised the authority to summarily punish servicemembers under their command for minor disciplinary infractions. During the Civil War, Congress created "Field Officer Courts," consisting of one field grade officer who summarily adjudicated charges against enlisted troops for non-capital offenses.[2] The maximum punishment authorized at these courts was a fine of one month's pay and one month's confinement or hard labor.[3] In 1890, Congress created a peacetime "summary court," providing military members the right to refuse trial by the summary court and

[1] *See* Article 27(a)(1); R.C.M. 1301(e) ("The accused at a summary court-martial does not have the right to counsel.").

[2] Act of July 17, 1862, ch. CCI, § 7, 12 Stat. 598; *see* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 490-92 (photo reprint 1920) (2d ed. 1896).

[3] Act of April 10, 1806, ch. XX, art. 67, 2 Stat. 367 (providing the punishment limitations for garrison or regimental courts-martial, which also applied to "Field Officer Courts").

demand trial by court-martial.[4] The statutory authority for this court endured through various iterations of the Articles of War until it, in turn, formed the basis of Article 20 when the UCMJ was enacted in 1950.[5] Under the UCMJ, the purpose of the summary court-martial, which "occupies a position between informal non-judicial disposition under Article 15 and the courtroom-type procedure of the general and special courts-martial . . . 'is to exercise justice promptly for relatively minor offenses under a simple form of procedure.'"[6] In 1976, in *Middendorf v. Henry*, the Supreme Court considered a Sixth Amendment challenge to the summary court-martial based on the lack of right to counsel.[7] The Court denied the challenge, holding that "a summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment."[8]

4. Contemporary Practice

Summary courts-martial typically are convened to provide for prompt disposition of minor offenses. Cases may be referred directly to a summary court-martial for disposition. Summary courts-martial also may be convened pursuant to a pretrial agreement, where the accused agrees to plead guilty at summary court-martial in exchange for the inherent protections offered by this low-level forum (limited confinement; limited reduction; limited forfeitures). In addition, a convening authority may consider referral to a summary court-martial among the options for disposition when an accused has exercised the right under Article 15 to request trial by court-martial in lieu of a non-judicial punishment proceeding. The President has implemented the rules and procedures for summary courts-martial primarily in Chapter XIII of the Rules for Courts-Martial, with additional guidance provided through service regulations.

5. Relationship to Federal Civilian Practice

There is no direct civilian equivalent to the summary court-martial; however, "pretrial diversion" programs are available in the federal system, substituting community supervision or the performance of other services in lieu of criminal prosecution in order to save judicial resources for major cases.[9] Although not directly analogous, there are some

[4] Act of Oct. 1, 1890, ch. 1259, 26 Stat. 648; *see also* MCM 1898, 65-69.

[5] AW 104 of 1916; AW 14 of 1948; *see* H.R. REP. NO. 81-491 at 17 (1949).

[6] Middendorf v. Henry, 425 U.S. 25, 32 (1976) (citing MCM 1969, ¶79*a*.).

[7] *Id.*

[8] *Id.* at 42. In arriving at its conclusion, the Court explained that the legitimacy of the summary court-martial rested upon the important distinction between civilian and military society, noting that "the court-martial proceeding takes place not in civilian society, as does the parole revocation proceeding, but in the military community with all of its distinctive qualities." *Id.* at 37.

[9] *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-22.000 (describing pretrial diversion, generally); § 9-2.022 (identifying pretrial diversion as an alternative to federal prosecution); § 9-27.250 (discussing factors for recommending non-criminal disposition of federal offenses) (2009). The use of such programs varies widely from district to district.

similarities in function between these diversion programs and the summary court-martial forum.

6. Recommendation and Justification

Recommendation 20: Amend Article 20 by adding a new subsection expressly defining the summary court-martial as "a non-criminal forum" and clarifying that "[a] finding of guilty at a summary court-martial does not constitute a criminal conviction."

- Like a non-judicial punishment proceeding under Article 15, a summary court-martial under Article 20 provides commanders with an option for disposition of minor offenses in a non-criminal forum where the findings do not constitute a criminal conviction. Unlike an Article 15 proceeding, however, the designation of a proceeding under Article 20 as a "court-martial" may lead government and private sector entities to treat the results of a summary court-martial as a criminal conviction. To clarify the status of a summary court-martial, the amendment would expressly set forth the non-criminal nature of this forum.

- In Part II of the Report, further consideration will be given to the development of guidance concerning to the rules and procedures used in summary courts-martial, as well as appropriate use of, and consequences flowing from, the results of summary courts-martial adjudications.

7. Relationship to Objectives and Related Provisions

- The proposal supports MJRG Operational Guidance by adding clarifying language to Article 20 to ensure the records of summary court-martial convictions are not categorized by agencies or organizations, both inside and outside of the Department of Defense, as constituting a criminal conviction from a "judicial" proceeding.

8. Legislative Proposal

SEC. 404. SUMMARY COURT-MARTIAL AS NON-CRIMINAL FORUM.

Section 820 of title 10, United States Code (article 20 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a) IN GENERAL.—" before "Subject to"; and

(2) by adding at the end the following new subsection:

"(b) NON-CRIMINAL FORUM.—A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction.".

9. Sectional Analysis

Section 404 would amend Article 20 to clarify the status of the summary court-martial as a non-criminal forum. In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Supreme Court held that a summary court-martial does not constitute a criminal prosecution. Although a summary court-martial appropriately may result in administrative and personal consequences, it does not have the collateral consequences of a criminal conviction because it does not reflect a determination made by a judicial, criminal forum. The proposed amendment would clarify that, because of its non-judicial nature, a summary court-martial is not a "criminal prosecution," within the traditional due process understanding of a criminal prosecution (i.e., presided over by a judicial officer, and where the accused has a right to counsel) and that a finding of guilty at a summary court-martial does not constitute a "criminal conviction."

Article 21 – Jurisdiction of Courts-Martial Not Exclusive

10 U.S.C. § 821

1. Summary of Proposal

This Report recommends no change to Article 21. Part II of the Report will consider whether any changes are needed in the rules implementing Article 21.

2. Summary of the Current Statute

Article 21 provides that the provisions of the UCMJ that confer jurisdiction upon a court-martial do not deprive other military tribunals of concurrent jurisdiction over the offense or the offender. The statute expressly does not apply to military commissions established under chapter 47A of title 10, United States Code.

3. Historical Background

Article 21 was based on Article 15 of the Articles of War and reflected the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), upholding the President's authority to convene military commissions.[1] The legislative history of Article 21 indicates congressional intent to preserve double jeopardy protections by providing for concurrent jurisdiction between the UCMJ and other military tribunals or commissions, without permitting the government to try an individual in both forums.[2] In 2006, as part of the Military Commissions Act, Congress added a sentence to Article 21 stating the provisions of the statute do not apply to the military commissions provided for under that Act.[3]

4. Contemporary Practice

The President has implemented Article 21 through R.C.M. 201(g), which essentially repeats the statutory provisions.

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 976 (1949).

[3] Pub. L. No. 109-366, § 4, 120 Stat 2600 (2006).

5. Relationship to Federal Civilian Practice

Article 21 is unique to the UCMJ and does not have a federal statutory counterpart. The concept of concurrent jurisdiction, however, is well-established with respect to the concurrent jurisdiction of military, federal civilian, and state courts over many matters.[4]

6. Recommendation and Justification

Recommendation 21: No change to Article 21.

- This report recommends no change to Article 21. The current statutory provision fully addresses the article's intended purpose. The procedures implementing this provision support the statute's intent and function.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 21.

7. Relationship to Objectives and Related Provisions

- This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

[4] *See* 57 CORPUS JURIS SECUNDUM MILITARY JUSTICE § 19 (2015) (Where an offense amounts to a violation of state or federal nonmilitary penal law as well as a violation of the UCMJ, the jurisdiction of courts-martial is concurrent with the jurisdiction of the civil courts); *see also* 53 AMERICAN JURISPRUDENCE 2nd Military and Civil Defense § 239 (2015) (The statutory grant of authority to courts-martial to try specified offenses against the civil law of a state does not operate to deprive the civilian courts of their normal jurisdiction over prosecutions for those offenses).

Subchapter V. Composition of Court-Martial

Article 22 – Who May Convene General Courts-Martial
10 U.S.C. § 822

1. Summary of Proposal

This proposal would make a technical amendment to Article 22 to reflect the current terminology for the title of an officer commanding a naval fleet, with no substantive changes to the statute. Part II of the Report will consider whether any additional changes are needed in the rules implementing Article 22.

2. Summary of the Current Statute

Article 22 provides that the authority to convene general courts-martial may be exercised by the President, designated senior civilian officials and commanding officers, and commanding officers empowered to do so by the President. The statute also addresses the process for consideration of a case when a commanding officer empowered to convene courts-martial is the accuser, and the general power of superior commanding officers to exercise court-martial convening authority.

3. Historical Background

Article 22 was derived from Article 8 of the Articles of War and Article 38 of the Articles for the Government of the Navy.[1] In 1986, Congress amended Article 22 to add the Secretary of Defense and combatant commanders to the list of general court-martial convening authorities;[2] and in 2006, Congress removed the reference to a commanding officer of a "Territorial Department."[3]

4. Contemporary Practice

The President has implemented Article 22 through R.C.M. 504. The statute and the rule reflect current practice.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1131-32 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 4-6 (1951).

[2] Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 211(b), 100 Stat. 1017.

[3] NDAA FY 2006, Pub. L. No. 109-163, § 1057(a)(2), 119 Stat. 3136.

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts with no direct analogy to courts-martial, each of which is a temporary tribunal convened to consider a specific case.[4]

6. Recommendation and Justification

Recommendation 22: Amend Article 22(a)(6) by removing the words "in chief."

- This is a minor technical change to reflect the current terminology for the commander of a naval fleet. No other statutory changes are needed.
- Part II of the Report will consider whether any additional changes are needed in the rules implementing Article 22.

7. Relationship to Objectives and Related Provisions

- This is a minor technical change and is not related to any other provisions of the Code.

8. Legislative Proposal

SEC. 501. TECHNICAL AMENDMENT RELATING TO PERSONS AUTHORIZED TO CONVENE GENERAL COURTS-MARTIAL.

Section 822(a)(6) of title 10, United States Code (article 22(a)(6) of the Uniform Code of Military Justice), is amended by striking "in chief".

9. Sectional Analysis

Section 501 would make a technical amendment to Article 22 to reflect the current terminology for the title of an officer commanding a naval fleet, with no substantive changes.

[4] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

Article 23 – Who May Convene Special Courts-Martial
10 U.S.C. § 823

1. Summary of Proposal

This Report recommends no change to Article 23. Part II of the Report will consider whether any changes are needed in the rules implementing Article 23.

2. Summary of the Current Statute

Article 23 identifies the officials who may convene special courts-martial: all general court-martial convening authorities; commanding officers of various commands and military installations; and commanding officers or officers-in-charge of any other command when empowered by the Secretary concerned. The article also provides that if any such official is an accuser, the court must be convened by superior competent authority.

3. Historical Background

Article 23 was derived from Article 9 of the 1920 Articles of War and Article 26 of the 1930 Articles for the Government of the Navy.[1] It has changed little since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

The President has implemented Article 23 through R.C.M. 504, which provides additional clarification concerning the definition of "separate and detached" commands and units, and specifies procedures for determining whether particular commands are separate and detached. The statute and the rule reflect current practice.

5. Relationship to Federal Civilian Practice

Because federal civilian courts are courts of standing jurisdiction, there is no civilian equivalent of court-martial "convening authority" as exercised by military commanders and other designated officials under Articles 22, 23, and 24.[3]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1137 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 6-7 (1951).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

6. Recommendation and Justification

Recommendation 23: No change to Article 23.

- In view of the well-developed case law addressing Article 23's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 23.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique aspect of military law that is essential to command authority and the administration of military justice under the Code.

Article 24 – Who May Convene Summary Courts-Martial
10 U.S.C. § 824

1. Summary of Proposal

This Report recommends no change to Article 24. Part II of the Report will consider whether changes are needed in the rules implementing Article 24.

2. Summary of the Current Statute

Article 24 identifies the officials who may convene summary courts-martial: all general and special court-martial convening authorities; commanding officers of detached companies or other Army detachments; commanding officers of detached squadrons or other Air Force detachments; and commanding officers or officers in charge of any other command when empowered by the Secretary concerned. The statute also provides that when only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him.

3. Historical Background

Article 24 was derived from Article 10 of the Articles of War and Article 64 of the Articles for the Government of the Navy.[1] The statute has remained unchanged since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

The President has implemented Article 24 through R.C.M. 504(d)(2) and R.C.M. 1302, the latter of which provides discretion to the convening authorities to determine whether to forward charges to a superior authority when the summary court-martial or the convening authority is the accuser. R.C.M. 504(b)(2)(A) provides clarification concerning the definition of "separate and detached" commands and units and procedures for determining whether particular commands are separate and detached. The specific rules and procedures for summary courts-martial are laid out in Chapter XIII of the Rules for Courts-Martial. The statute and the rules implementing the statute reflect current practice.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1137-38 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 7 (1951).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

5. Relationship to Federal Civilian Practice

Because federal civilian courts are courts of standing jurisdiction, there is no civilian equivalent of court-martial "convening authority" as exercised by military commanders and other designated officials under Articles 22, 23, and 24.[3]

6. Recommendation and Justification

Recommendation 24: No change to Article 24.

- Consistent with this Report's recommendations to retain the basic authority and purpose of summary court-martial, and in view of the well-developed case law addressing Article 24's provisions, a statutory change is not necessary.
- Part II of the Report will consider whether any changes are needed in the rules implementing Article 24.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique feature of the military justice system that allows for efficient disposition of relatively minor offenses in an administrative, non-criminal forum.

[3] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

Article 25 – Who May Serve on Courts-Martial
10 U.S.C. § 825

1. Summary of Proposal

This proposal would amend Article 25 to expand the opportunity for service on a court-martial by enlisted personnel. Under the proposal, the convening authority would have the option of detailing enlisted personnel to a court-martial in the initial convening order. The accused would then have the opportunity to request a different panel composition, reflecting the two alternatives under current law. The accused could request either a panel composed entirely of officers or a panel composed of at least one-third enlisted personnel. The proposal would retain the current prohibition against detailing panel members who are junior in rank and grade to the accused, but would remove the statutory prohibition against detailing enlisted panel members (but not officers) who are from the same unit as the accused. The proposal would instead rely on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused.

2. Summary of the Current Statute

Article 25 defines the eligibility requirements for members serving on courts-martial panels. Currently, the convening authority selects and details members using the following criteria listed in Article 25(d)(2): age, education, training, experience, length of service, and judicial temperament. The convening authority may select any active duty commissioned officer or warrant officer for service on a general or special court-martial panel.[1] The convening authority may also detail enlisted members, but only if requested by an enlisted accused. If such a request is made, Article 25(c)(1) provides that enlisted membership must comprise at least one-third of the total membership of the panel, unless eligible enlisted members cannot be obtained due to physical conditions or military exigencies.[2] When it can be avoided, an accused may not be tried by a member junior in rank or grade;[3] and in all cases, enlisted members may never be detailed from the accused's same unit[4]

[1] Warrant officers and enlisted members are only eligible to serve as panel members on general and special courts-martial, whereas commissioned officers are eligible to serve on all courts-martial, including as a summary court-martial officer. Article 25(a)-(b).

[2] If enlisted members cannot be obtained following a request by the accused for enlisted membership on the panel, Article 25(c)(1) requires the convening authority to make a detailed written statement, to be appended to the record of trial, stating why they could not be obtained.

[3] Prohibitions against members being tried at courts-martial by persons of inferior rank have been in effect since 1775. *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENCE 951-983 (2000 reprint) (2d ed. 1920).

unless the prohibition is waived by the accused.[5] Article 25(e) permits the convening authority to excuse members before the court-martial is assembled—delegable to the staff judge advocate, legal officer, or another principal assistant pursuant to service regulations. After the court-martial is assembled, however, Article 29 provides that members may be added to or removed from the panel only with the approval of the military judge.

3. Historical Background

The right to trial by jury in criminal cases has not been extended to courts-martial.[6] Beginning in the Revolutionary era, the Articles of War and Articles for the Government of the Navy provided for the appointment of officers to serve on courts-martial, but otherwise did not provide statutory criteria for their selection by court-martial convening authorities. In the aftermath of controversies about court-martial practices during World War I,[7] Congress first set forth basic criteria for service on courts-martial in the 1920 Articles of War.[8] When Congress enacted the UCMJ in 1950, it incorporated these selection criteria into Article 25.[9] With respect to enlisted representation on courts-martial, Congress did not authorize enlisted representation in statute until 1948, as part of the Elston Act amendments.[10] This authorization was incorporated into Article 25 as enacted in 1950. From 1950 to 1986, Article 25 required all requests for enlisted members to be in writing. In 1986, Congress amended the statute to allow for oral requests by the accused.[11]

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[4] Article 25(c)(2) currently defines a unit as being: "[A]ny regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them."

[5] *See* United States v. Kimball, 13 M.J. 659, 660 (N.M.C.M.R. 1982) (holding that "where the accused and his defense counsel purported at trial to waive any objection to the enlisted members on the grounds that they were from the same unit as the accused, he will not be permitted to challenge the composition of the court in this regard on appeal.").

[6] *Ex parte* Quirin, 317 U.S. 1 (1942); *Ex parte* Milligan, 71 U.S. 2 (1866); United States v. Guilford, 8 M.J. 598, 601 (1979); *see also* Sanford v. United States, 586 F.3d 28 (D.C. Cir. 2009); Mendrano v. Smith, 797 F.2d 1538 (10th Cir. 1986).

[7] *See* Edward F. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 21 (1970); Gary C. Smallridge, *The Military Jury Selection Reform Movement*, A. F. L. REV. 343, 347-349 (1978). *See generally* United States v. White, 25 C.M.R 357 (1972).

[8] AW 4 of 1920 ("When appointing courts-martial, the appointing authority shall detail as members thereof, those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament. . . ."); *see* WINTHROP, *supra* note 3, at 951-997.

[9] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1138-52 (1949).

[10] AW 16 of 1948. The Ansell-Crowder debates, which preceded the passage of the 1920 Articles of War, first raised the possibility of having enlisted members serve on military panels.

[11] Military Justice Act of 1983, Pub. L. No. 98-209, § 803(a), 97 Stat. 1393.

4. Contemporary Practice

A court-martial is a temporary body, created by a convening order to hear a specific case. Each convening order sets forth the names of the individual members detailed to serve on the specific court-martial. The members are selected by the convening authority, frequently from lists of nominees prepared by the convening authority's staff judge advocate with input from the nominees' superiors. Most services prepare lists of members designated for service over a period of time; in one service, a new list of members is prepared for each case.[12] An allegation of improper manipulation of the member selection process may be reviewed as an issue of unlawful command influence.[13]

The President has implemented Article 25 through R.C.M. 502 (Qualifications and duties of personnel of courts-martial), R.C.M. 503 (Detailing members, military judge, and counsel), R.C.M. 505 (Changes of members, military judge, and counsel), and R.C.M. 903 (Accused's elections on composition of court-martial). R.C.M. 903(a)(1) specifically provides that the military judge shall ascertain, on the record and before the end of the initial Article 39(a) session, whether the accused wishes to exercise his right to elect enlisted membership on the panel. The convening authority's excusal power under Article 25(e) and R.C.M. 505(c) is typically exercised when the member has an approved reason for being absent from court duty.

5. Relationship to Federal Civilian Practice

Under the Sixth Amendment and 28 U.S.C §§ 1861-1869, federal jurors are randomly selected, and the jury venire is required to represent a fair cross-section of the local community in the district or division where the court convenes. Each federal district court is required to devise and implement a written plan for random selection of jurors that does not exclude potential jurors on the basis of race, color, religion, sex, national origin, or economic status. The practices for selecting and impaneling juries vary widely among the federal districts, as the specific processes are managed by judges, administrative staff, and local district rules.[14] The military justice system must be able to operate in deployed and

[12] In the Army, Navy, Marine Corps, and Coast Guard, the common practice is for an annual standing convening order, with amendments made for specific courts-martial. Commanders update these standing orders annually or upon assuming command. *See* ARMY REG. 27-10; JAGINST 5800.7F; MARINE CORPS ORDER 5800.16A; COMMANDANT INSTR. M5810.1E. In the Air Force, commanders publish new convening orders for each new case referred for trial. *See* AIR FORCE INSTR. 51-201.

[13] *See, e.g.*, United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (reversing for improper denial of challenge for cause of senior panel member who was in the chain of command of five other persons on the venire); United States v. Drain, 17 C.M.R. 44 (C.M.A. 1954) (reversing for improper denial of challenge for cause of senior panel member in part because he wrote the efficiency reports of all other court members); United States v. Mitchell, 19 M.J. 905 (A.C.M.R. 1985) (remanding a case where evidence was raised that the commander made remarks capable of influencing court members to disregard favorable character testimony by a convicted solider who was a sentencing witness for the accused).

[14] *See* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE § 22.2(a) (3d ed. 2013) (describing the minimum requirements applicable to all random selection plans issued by federal district courts, and highlighting areas of difference).

operational environments in which large numbers of potential court-members are engaged in vital national security activities. As a consequence, it has not been considered practicable to adopt the civilian random selection model for use in courts-martial on a system-wide basis.[15] Although court-martial panel members are not considered to be jurors under the Sixth amendment,[16] a well-developed body of case law addresses the need for assembled court members to be objective and impartial.[17] In addition, members are subject to challenge and disqualification under criteria similar to—and in some cases more stringent than—the criteria applicable to removal of jurors from civilian panels.

6. Recommendation and Justification

Recommendation 25.1: Amend Article 25 to permit convening authorities to detail enlisted personnel to court-martial panels, subject to the accused's ability to specifically elect an all-officer panel under the same rules and procedures with which an accused may elect one-third enlisted panel membership.

- This proposal would benefit the court-martial panel member selection process by allowing commanders to detail highly qualified enlisted members with greater frequency and in greater numbers. This expanded opportunity for enlisted personnel to serve on panels would enable the court-martial process to benefit from the experience, education, training, and judgment of the high quality personnel who serve in the armed forces.

- The proposed change would increase the efficiency of the military justice system, by providing commanders with a broader pool of potential members to be detailed to courts-martial. Such a broader pool would be particularly important in situations involving small units, or remote or deployed locations.

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[15] Attempts at random panel selection efforts have been made—most notably in experiments occurring at Fort Riley in 1974 and, later, at V Corps in 2005. Both experiments sought to apply random-selection procedures, but produced unforeseen difficulties in meeting the criteria under Article 25(d)(2). *See* James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 128-130 (2010). In 1999, Congress directed the Joint Service Committee on Military Justice to study random selection of court-martial members. *See generally* JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL (1999). In its study, the Committee examined different methods of panel selection employed by the services, analyzed past random court-martial selection experiments, and analyzed Canadian and United Kingdom member-selection systems. *Id.* at 3. The Committee concluded that random selection is incompatible with Article 25(d)(2), and found that the standard selection method best applies Article 25(d)(2)'s best qualified mandate. *Id.* at 3, 22.

[16] *See* O'Callahan v. Parker, 395 U.S. 258 (1969); *Ex parte* Quirin, 317 U.S. 1 (1942). *See generally* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 485-500 (2014).

[17] *See, e.g.*, United States v. McQueen, 7 M.J. 281, 281 (C.M.A. 1979) ("The proper test to evaluate the propriety of the judge's denial of a challenge for cause 'is whether he (the prospective court member) is mentally free to render an impartial finding and sentence based on the law and the evidence.'") (quoting United States v. Parker, 19 C.M.R. 400, 410-411 (1955)).

- This recommendation reflects the reality that enlisted members are capable fact-finders, having received extensive technical training during the course of their careers, with many having additional education beyond high school. The ability of a convening authority to draw upon this resource in accordance with the criteria of Article 25 would enhance his or her ability to appoint a "blue ribbon" panel, when compared to a civilian jury randomly drawn from the community at large.[18]

- The proposed amendments would specifically retain the accused's ability to elect one-third enlisted panel membership, and would continue the right to elect an all-officer panel. This would ensure that any additional flexibility provided to convening authorities does not diminish an accused's alternatives under current law—to be trial by a panel composed of either officers, or to be tried by a mixed panel of officers and enlisted members.

Recommendation 25.2: Amend Article 25 by removing the statutory prohibition against detailing enlisted members to courts-martial who are from the same unit as an enlisted accused.

- This proposal would retain the statutory limitation against detailing panel members junior in rank and grade to the accused; however, it would eliminate the blanket prohibition against detailing enlisted members who are of the same unit as an enlisted accused. The current law contains no such limitation on the detailing of officers from the same unit as the accused. As such, current law provides an unnecessary distinction between enlisted members and officers. The proposal would eliminate this outmoded distinction, and rely instead on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused.

Recommendation 25.3: Amend Article 25(d) to conform to the proposed amendments under Article 29 concerning impaneling of members.

- This proposal would conform Article 25 to the proposed amendments in Article 29 requiring the detail of not less than 12 members in a capital case, 8 members in a non-capital general court-martial, and 4 members in a special court-martial.

7. Relationship to Objectives and Related Provisions

- This proposal supports MJRG Operational Guidance by enhancing efficiency during the panel selection phase of the court-martial process, which maintaining a unique and necessary feature of military justice practice.

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[18] *See* Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL'Y 19, 44 (2007) ("Looking separately at college educated jurors and analyzing their scientific backgrounds and responses to true-false items, this study found that the college educated jurors possessed some fact finding advantages over their juror peers with less education, and even in some instances over judges. The significance of such educational factors leads one to consider the possible advantages of employing blue ribbon juries in extremely complex trials.").

- This proposal is related to the changes proposed in Articles 16, 25a, 29, 41, and 53.

8. Legislative Proposal

SEC. 502. WHO MAY SERVE ON COURTS-MARTIAL; DETAIL OF MEMBERS.

(a) WHO MAY SERVE ON COURTS-MARTIAL.—Subsection (c) of section 825 of title 10, United States Code (article 25 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) Any enlisted member on active duty is eligible to serve on a general or special court-martial for the trial of any other enlisted member.

"(2) Before a court-martial with a military judge and members is assembled for trial, an enlisted member who is an accused may personally request, orally on the record or in writing, that—

"(A) the membership of the court-martial be comprised entirely of officers; or

"(B) enlisted members comprise at least one-third of the membership of the court-martial, regardless of whether enlisted members have been detailed to the court-martial.

"(3) Except as provided in paragraph (4), after such a request, the accused may not be tried by a general or special court-martial if the membership of the court-martial is inconsistent with the request.

"(4) If, because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members, as the case may be, are not available to carry out paragraph (2), the trial may nevertheless be held. In that event, the convening authority shall make a detailed written statement of the reasons for nonavailability. The statement shall be appended to the record.".

(b) DETAIL OF MEMBERS.—Subsection (d) of such section (article) is amended by adding at the end the following new paragraph:

"(3) The convening authority shall detail not less than the number of members necessary to impanel the court-martial under section 829 of this title (article 29).".

9. Sectional Analysis

Section 502 concerns the eligibility requirements for service on court-martial panels. The proposed amendments to Article 25 would expand the opportunity for service on a court-martial panel by permitting the detail of enlisted personnel as panel members without requiring a specific request from the accused. As amended, Article 25 would contain the following provisions:

Article 25(c)(1) and (d)(1) would retain the statutory prohibition against detailing panel members junior in rank and grade to the accused, but the statutory prohibition against detailing enlisted panel members who are of the same unit as an enlisted accused would be eliminated. There is no such limitation on the detailing of officers from the same unit as the accused under current law. As such, current law provides an unnecessary distinction between enlisted members and officers. The amendments would eliminate this outmoded distinction, and rely instead on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused. This change would enhance the convening authority's ability to draw from a large pool of highly qualified members, thereby expanding the opportunity for courts-martial to reflect the input of the high caliber enlisted personnel in the modern armed forces.

Article 25(c)(2) would retain the option for the accused to request a panel with at least one-third enlisted members. In addition, it would grant the accused the option to request

an all-officer panel, which is the default panel composition under current practice. The Article 25(d)(2) member-selection criteria (age, education, training, experience, length of service, and judicial temperament) would be retained to ensure that court-martial panels continue to be composed of the most highly qualified, eligible personnel. The statute's implementing rules would include appropriate adjustments to address requests for panels that include all officers or at least one-third enlisted representation.

Article 25(d)(3) would require that the convening authority detail a sufficient number of members for impanelment under the proposed amendments to Article 29. *See* Section 506, *infra.*

Article 25a – Number of Members in Capital Cases
10 U.S.C. § 825a

1. Summary of Proposal

This proposal would conform the number of panel members in a capital case to a fixed number of twelve members, as required in federal civilian criminal trials.

2. Summary of the Current Statute

Article 25a establishes a floor of twelve members for panels in capital cases, but it does not provide a ceiling, thereby permitting the number of members in capital cases to vary from case to case. The statute provides that the convening authority may specify a number of members less than twelve but not "less than five" (the current minimum for a general court-martial) when twelve members are "not reasonably available because of physical conditions or military exigencies."

3. Historical Background

Before 1920, the Articles of War required that all general courts-martial panels be composed of five to thirteen officers, including in capital cases.[1] In 1920, Congress amended the Articles of War to provide that general courts-martial panels could consist of "any number of officers not less than five";[2] in addition, the voting requirement in capital cases was changed to require a unanimous vote in order to adjudge a death sentence.[3] When the UCMJ was enacted in 1950, Congress incorporated these requirements into the Code in Article 52.[4] Article 25a, and its requirement for a twelve-member minimum in capital cases, was added in 2001.[5]

4. Contemporary Practice

The President has implemented Article 25a through R.C.M. 501(a)(1)(B), which mirrors the statutory provisions.

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[1] *See, e.g.*, AW 5 of 1916.

[2] AW 5 of 1920.

[3] AW 43 of 1920. *See generally* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 1-15 (1998) (explaining the historical development in the size and voting requirements for capital case court-martial panels).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] NDAA FY 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012, 1124 (2001).

5. Relationship to Federal Civilian Practice

In federal civilian capital cases, and in capital cases among the states that authorize the death penalty, a jury panel composed of at least twelve jurors is required.[6] Federal civilian capital cases require a fixed panel of twelve jurors unless the parties stipulate otherwise, or the defendant voluntarily waives his or her right to a trial by jury in writing, with government consent, and court approval.[7] Pursuant to Article 18, the right to waive a trial by members is not permitted in a military capital case.

6. Recommendation and Justification

Recommendation 25a: Amend Article 25a to require a fixed-size panel of twelve members in capital cases.

- By requiring twelve-member panels in all cases in which the accused may be sentenced to death, this proposal would align military practice with prevailing capital litigation practice in the United States.
- In the event the case becomes non-capital as a result of developments after referral, the case would proceed in accordance with the membership requirements under Articles 16, 29, and 53. If the case becomes non-capital after twelve members have been impaneled, the case would proceed with twelve members subject to the excusal provisions in Articles 29 and 53.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by incorporating the practices and rules used in U.S. district courts applicable to capital cases into military practice insofar as practicable.
- This proposal will impact or be impacted by related proposals in this Report pertaining to Articles 17-20, 25, 29, 41, 45, and 51-53.

8. Legislative Proposal

SEC. 503. NUMBER OF COURT-MARTIAL MEMBERS IN CAPITAL CASES.

Section 825a of title 10, United States Code (article 25a of the Uniform Code of Military Justice), is amended to read as follows:

[6] *See, e.g.*, Williams v. Florida, 399 U.S. 78, 103 (1970).

[7] FED. R. CRIM. P. 23.

"§825a. Art. 25a. Number of court-martial members in capital cases

"(a) IN GENERAL.—In a case in which the accused may be sentenced to death, the number of members shall be 12.

"(b) CASE NO LONGER CAPITAL.—Subject to section 829 of this title (article 29)—

"(1) if a case is referred for trial as a capital case and, before the members are impaneled, the accused may no longer be sentenced to death, the number of members shall be eight; and

"(2) if a case is referred for trial as a capital case and, after the members are impaneled, the accused may no longer be sentenced to death, the number of members shall remain 12.".

9. Sectional Analysis

Section 503 would amend Article 25a to establish a standard panel size of twelve members in capital cases, consistent with the standard size for juries in federal civilian capital trials. Under current law, panels in capital courts-martial are composed of a variable number of members no fewer than twelve, which means that the number of members can vary from case to case without any guiding principle to ensure consistency. Under the statute, as amended, in the event a case becomes non-capital as a result of developments after referral but prior to impanelment, the case would proceed in accordance with the membership requirements under Articles 16 and 29. If the case becomes non-capital after twelve members have been impaneled, it would proceed with twelve members subject to the excusal provisions in Articles 29.

Article 26 – Military Judge of a General or Special Court-Martial
10 U.S.C. § 826

1. Summary of Proposal

This proposal would amend Article 26 to conform to current practice by requiring that a military judge preside over every general and special court-martial, by providing for the designation of a chief trial judge by each Judge Advocate General, and by providing statutory authority for cross-service detailing of military judges with the approval of the Judge Advocate General of the Armed Force of which the military judge is a member. Further, the proposal would amend Article 26 to provide for uniform selection criteria and regulations concerning minimum tour lengths for military judges with limited exceptions.

2. Summary of the Current Statute

Article 26 requires that a military judge be detailed to preside over every general court-martial, and provides discretionary authority for the detailing of military judges to preside over special courts-martial.[1] Article 26 further provides that a military judge must be a commissioned officer who is a member of the bar and who is certified as qualified for service as a military judge by the Judge Advocate General. In addition, Article 26 prohibits a person who is the accuser or a witness for the prosecution, or who has investigated or acted as counsel in the case, from acting as a military judge in the same case. Under Article 26(e), any consultation between the military judge and members of the court-martial must take place in the presence of the accused, trial counsel, and defense counsel. The military judge serves as the presiding official, not as a voting member of the court.

3. Historical Background

Prior to enactment of the UCMJ, a court-martial consisted of a board of officers without a presiding judge. At the time, courts-martial did not include a military judge. Under the Articles of War, the Army employed a "law member" who, in addition to participating as a member of the panel, could rule on certain legal issues.[2] The UCMJ, as enacted in 1950, required the detailing of a law officer to each general court-martial.[3] The law officer was

[1] Article 19 currently requires that, in any special court-martial case where a military judge could not be detailed to the trial because of physical conditions or military exigencies, the convening authority shall provide a detailed written explanation stating the reason a military judge could not be detailed. In practice, no special court-martial is held without a military judge, and the accompanying proposal to amend Article 19 conforms to this practice.

[2] MCM 1928, ¶¶39-40; *see also* Henry A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge?*, 9 CAL. W. L. REV. 57, 73 (1972).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

not a member of the panel and did not deliberate or vote on findings or the sentence.[4] The law officer performed many, but not all, of the duties of a trial court-judge.[5] In special courts-martial, the president of the court-martial served as the presiding official.[6]

In the Military Justice Act of 1968, Congress transformed the law officer position into that of the military judge, with authority to preside over courts-martial under Article 26. Other changes in the 1968 legislation authorized the military judge to conduct motion and related hearings without the presence of the panel members, to preside in judge-alone non-capital cases upon request of the accused, and to perform the duties generally associated with the judicial role in criminal proceedings.[7]

4. Contemporary Practice

Under current law, Article 26 and accompanying service regulations control the duties of military judges in courts-martial as well as the detailing and rating of judges. Military judges must be detailed to every general court-martial; they may also be detailed to special courts-martial, but because the UCMJ currently provides for the possibility of a special court-martial without a military judge, it does not require detailing of a special-court-martial judge in every case. The UCMJ currently provides no authority for a military judge to act as a judge outside the context of a referred case, and Article 26 limits detailing of a judge to a referred court-martial case.

The Judge Advocates General select judge advocates for assignment as military judges using minimal statutory standards supplemented by individual service criteria. Most services have an assigned chief trial judge, established by service regulations. The chief trial judges perform various functions related to their positions, such as supervising and rating other judges, detailing other judges to cases, and coordinating judicial training. All of the services have formal or informal minimum tour lengths for military judge assignments that are not less than three years, with established exceptions for ending these tours early.

The President has implemented Article 26 through R.C.M. 503(b)(3). In 2005, this rule was updated to clarify that a military judge from any service may be detailed to a court-martial convened within another service or a combatant command or joint command, when

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM 1951, Part IX, ¶39. The law officer, who was required to be a lawyer, advised the court on questions of law and procedure, provided instructions to the members on findings, assisted in putting findings in proper form, and upon findings of guilt, advised as to the maximum authorized punishment for each offense.

[6] MCM 1951, Part IX, ¶40. The president of the court, generally not a lawyer, was the senior ranking member and "presiding officer of the court." The president was expected to preserve order in the courtroom, set the time and place of trial, administered oaths, and recessed or adjourned the court. In special courts-martial, the president served as the presiding official and addressed legal matters.

[7] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. The revised Article 26 and accompanying MCM provisions required general court-martial convening authorities to detail military judges to all general courts-martial, while special court-martial convening authorities had the option to detail a military judge to special courts-martial. *See* MCM 1969, ¶4*e*.

permitted by the Judge Advocate General of the armed force of the judge. This rule, as well as R.C.M. 201(e)(4), allows for cross-service detailing of military judges.

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts with no direct analogy to courts-martial, each of which is a temporary tribunal convened to consider a specific case.[8] In the federal civilian system, judges are presidentially appointed, subject to Senate confirmation, with life tenure in the case of Article III judges,[9] or tenure for a statutory term in the case of Article I judges.[10] Federal district court judges consider issues and make judicial rulings at the request of a party or in response to requirements of the Federal Rules of Criminal Procedure any time after a defendant has made an initial appearance. A judge becomes the chief judge of a U.S. district court or U.S. circuit court of appeals based on seniority among eligible judges. The President appoints the Chief Justice of the United States, subject to confirmation by the Senate. Federal district court judges may preside over cases in other federal districts within their circuit if designated by the Chief Judge of their circuit. The Chief Justice of the United States may designate district court judges to preside outside their own circuit.[11]

6. Recommendation and Justification

Recommendation 26.1: Amend Article 26: (1) to conform the statute to the current practice of detailing a military judge to every general and special court-martial; (2) to provide for cross-service detailing of military judges; (3) to require a chief trial judge in each armed force; and (4) to provide appropriate criteria for service as a military judge.

- This proposal would conform Article 26 to current practice by requiring that a military judge preside over every general and special court-martial, and by requiring a chief trial judge in each service. It also would codify the authority for detailing military judges to a court convened by a joint commander or within another armed force.
- The proposal would establish statutory criteria for selection for service as a military judge, including education, training, experience, and judicial temperament.
- The proposal would remove "or his designee" from Article 26 in the three instances that phrase occurs to conform to current practice under the UCMJ, in which the

[8] *See* United States v. Denning, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

[9] U.S. CONST. art. III.

[10] *See, e.g.*, 26 U.S.C. § 7443 (providing for fifteen-year terms of appointment for U.S. Tax Court judges); 38 U.S.C. § 7253 (providing for fifteen-year appointments for judges of the Veteran's Court of Appeals).

[11] 28 U.S.C. § 292.

Judge Advocate General has designated other officials to perform duties without express statutory reference to the ability to designate.

Recommendation 26.2: Amend Article 26 to authorize the President to establish uniform regulations concerning minimum tour lengths for military judges with provisions for early reassignment as necessary.

- This proposal would provide a stable tour length for military judges, consistent with the vital importance of developing a significant level of experience within the judiciary.
- The proposed amendments support uniformity of practice among the services with respect to tour lengths for assignment of military judges, with exceptions for early reassignment.
- Part II of the Report will address changes in the rules implementing Article 26, with particular emphasis on the rules concerning minimum tour lengths for military judges. The implementing rules in Part II will reflect the Services' role and discretion in applying exceptions to the minimum tour lengths.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC terms of reference by better aligning the provisions of Article 26 with federal civilian practice and by applying provisions more uniformly across the services.
- The proposal would codify the ability of each Judge Advocate General to detail military judges to cases outside their services and to establish a unified minimum tour length for all military trial judges.

8. Legislative Proposal

SEC. 504. DETAILING, QUALIFICATIONS, ETC. OF MILITARY JUDGES.

(a) SPECIAL COURTS-MARTIAL.—Subsection (a) of section 826 of title 10, United States Code (article 26 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by inserting after "each general" the following: "and special"; and

(2) by striking the second sentence.

(b) QUALIFICATIONS.—Subsection (b) of such section (article) is amended by striking "qualified for duty" and inserting "qualified, by reason of education, training, experience, and judicial temperament, for duty".

(c) DETAIL AND ASSIGNMENT.—Subsection (c) of such section (article) is amended to read as follows:

"(c)(1) In accordance with regulations prescribed under subsection (a), a military judge of a general or special court-martial shall be designated for detail by the Judge Advocate General of the armed force of which the military judge is a member.

"(2) Neither the convening authority nor any member of the staff of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to the military judge's performance of duty as a military judge.

"(3) A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial—

"(A) may perform such duties only when the officer is assigned and directly responsible to the Judge Advocate General of the armed force of which the military judge is a member; and

"(B) may perform duties of a judicial or nonjudicial nature other than those relating to the officer's primary duty as a military judge of a general court-martial when such duties are assigned to the officer by or with the approval of that Judge Advocate General.

"(4) In accordance with regulations prescribed by the President, assignments of military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(d) DETAIL TO A DIFFERENT ARMED FORCE.—Such section (article) is further amended by adding at the end the following new subsection:

"(f) A military judge may be detailed under subsection (a) to a court-martial or a proceeding under section 830a of this title (article 30a) that is convened in a different armed force, when so permitted by the Judge Advocate General of the armed force of which the military judge is a member.".

(e) CHIEF TRIAL JUDGES.—Such section (article), as amended by subsection (d), is further amended by adding at the end the following new subsection:

"(g) In accordance with regulations prescribed by the President, each Judge Advocate General shall designate a chief trial judge from among the members of the applicable trial judiciary.".

9. Sectional Analysis

Section 504 contains amendments to Article 26 pertaining to the detailing and qualifications of military judges, as follows:

Section 504(a) would amend Article 26(a) to conform to the proposed amendments to Article 16 and to reflect current practice in which a military judge is detailed to every general and special court-martial.

Section 504(b) would amend Article 26(b) to provide that the Judge Advocates General certify officers to be military judges who are most qualified to serve by virtue of meeting statutory criteria and through an evaluation of their individual education, training, experience, and judicial temperament.

Section 504(c) would amend Article 26(c) to provide for Manual provisions concerning minimum tour lengths for military judges. Implementing rules would enable the Services to apply appropriate exceptions to the minimum tour lengths.

Section 504(d) would add a new subsection (f) to Article 26 to expressly authorize cross-service detailing of military judges. Although such detailing has been addressed in the Rules for Courts-Martial, these amendments would provide clear statutory authority for this practice.

Section 504(e) would further amend Article 26 by adding a new subsection (g) to codify the position of chief trial judge. Under implementing regulations, the chief judge could detail subordinate military judges to particular cases, and carry out additional duties as directed by the Judge Advocates General or as identified in the UCMJ, MCM, and service regulations.

The proposed amendments to Article 26 also would remove the phrase "or his designee" from Article 26 in the three instances where it occurs. This change would conform the statute to current practice under the UCMJ, in which the Judge Advocate General has designated other officials to perform duties without express statutory reference to the ability to designate.

Article 26a (New Provision) – Military Magistrates
10 U.S.C. § 826a

1. Summary of Proposal

This proposal would create a new section, Article 26a, providing the minimum qualifications for military magistrates and providing that military magistrates may be assigned under service regulations to perform duties other than those described under Articles 19 and 30a.

2. Summary of the Current Statute

This proposal would create a new article of the UCMJ.

3. Historical Background

The Military Justice Act of 1968 established the position of military judge at courts-martial, created independent trial judiciaries within the services, and granted an accused the right to elect a trial by military judge alone, without members.[1] Since 1968, the law and the practice in the military justice system have shifted primary responsibility to military trial judges to preside over all aspects of court-martial procedure.[2]

4. Contemporary Practice

There is no current statutory provision specifically authorizing or describing military magistrates. However, under the executive authority governing military search authorizations, the President has provided military judges and non-statutory magistrates the power to issue search authorizations.[3]

5. Relationship to Federal Civilian Practice

The Federal Magistrates Act of 1968 established the magistrate judge system for the federal civilian courts.[4] A federal magistrate judge's jurisdiction and powers are set forth

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[1] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[2] *See generally* Fansu Ku, *From the Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009).

[3] M.R.E. 315(d)(2) ("Authorization to search pursuant to this rule may be granted by . . . [a] military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned.").

[4] Pub. L. No. 90-578, Oct. 17, 1968, 82 Stat. 1107. The 1968 Act was preceded by a system of appointed "discreet persons learned in the law" who were authorized by Congress in 1793 to be available to set bail for defendants in federal criminal cases.

by statute.[5] The local rules in each district outline the specific duties magistrate judges are assigned, and they may act on authority expressly granted by federal district court judges or by consent of the parties.[6]

A magistrate judge's duties vary considerably depending on local rules. In criminal cases, magistrate judges have full authority to preside over trials involving petty offenses and in Class A misdemeanor cases by consent of the parties. Magistrate judges assist in felony preliminary proceedings (search and arrest warrants, summonses, initial appearances, preliminary examinations, arraignments, and detention hearings) and in felony pretrial matters (pretrial motions, evidentiary hearings, probation/supervised release hearings, and guilty plea proceedings). When a federal criminal defendant is placed in pretrial confinement, the defendant has the right to a detention hearing during his initial appearance before a magistrate judge.[7] This hearing determines whether continued confinement of the defendant before trial is warranted. Either party may seek an immediate de novo review of a detention order before a federal district court judge.[8] A magistrate judge may administer oaths and issue orders pertaining to the setting of bail or detention without authorization from a district judge.[9]

6. Recommendations and Justification

Recommendation 26a: Enact a new section, Article 26a, providing the minimum qualifications for military magistrates and providing that military magistrates may be assigned under service regulations to perform duties other than those described under Articles 19 and 30a.

- This proposal would align the qualification requirements for military magistrates with the qualification requirements of military judges under Article 26.
- This proposal also would authorize the Secretary concerned to prescribe regulations governing other duties that military magistrates may perform in addition to the duties specified under Articles 19 and 30a. Such duties could include, for example, duty as a preliminary hearing officer under Article 32 or as summary courts-martial officers. Such duties also could include issuing search authorizations and performing pretrial confinement reviews, both before and after referral of charges.

[5] 28 U.S.C. § 636.

[6] 28 U.S.C. § 636(b)-(c).

[7] 18 U.S.C. § 3142

[8] United States v. Leon, 766 F.2d 77, 80 (2nd Cir. 1985)

[9] 28 U.S.C. § 636(a).

7. Relationship to Objectives and Related Provisions

- This proposal to create a new section, Article 26a, supports the Terms of Reference by incorporating positive aspects of the federal civilian judicial system into the current military justice structure.
- The proposal is related to Article 26, which addresses qualification requirements for military judges, and to Articles 19 and 30a, which would allow detailed military judges to designate military magistrates to preside over judge-alone special courts-martial (with consent of the parties) and proceedings before referral of charges and specifications to court-martial for trial.

8. Legislative Proposal

SEC. 507. MILITARY MAGISTRATES.

Subchapter V of chapter 47 of title 10, United States Code, is amended by inserting after section 826 (article 26 of the Uniform Code of Military Justice) the following new section (article):

"§826a. Art. 26a. Military magistrates

"(a) QUALIFICATIONS.—A military magistrate shall be a commissioned officer of the armed forces who—

"(1) is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and

"(2) is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the Judge Advocate General of the armed force of which the officer is a member.

"(b) DUTIES.—In accordance with regulations prescribed by the Secretary concerned, in addition to duties when designated under section 819 of this title or section 830a of this title (articles 19 or 30a), a military magistrate may be assigned to perform other duties of a nonjudicial nature.".

9. Sectional Analysis

Section 507 would create a new section, Article 26a, which would set forth minimum qualifications under which the Judge Advocates General, in accordance with service regulations, could certify military magistrates who could preside over proceedings under Articles 19 and 30a when designated by the detailed military judge.

Under Article 26a(b), military magistrates also could be assigned to non-judicial duties if so authorized under regulations of the Secretary concerned. This provision recognizes that the services have programs through which qualified officers may be detailed to perform duties of a non-judicial nature—that is, duties that do not have to be performed by a military judge—such as issuing search authorizations or serving as a summary court-martial officer, preliminary hearing officer, or pretrial confinement review officer.

Article 27 – Detail of Trial Counsel and Defense Counsel

10 U.S.C. § 827

1. Summary of Proposal

This proposal would amend Article 27 by requiring the detailing of qualified defense counsel to all special courts-martial, and by requiring, "to the greatest extent practicable," the detailing of defense counsel "learned in the law applicable to capital cases" in all capital cases. This proposal would retain the authority for the services to detail individuals not qualified under Article 27(b)—such as law students preparing to become judge advocates—to serve as trial counsel in special courts-martial and assistant trial counsel in both general and special courts-martial, but would require that they meet minimum requirements prescribed by the President before being detailed. The proposed amendments also would broaden the disqualification provision under Article 27(a)(2) to include appellate judges who have participated in the same case.

2. Summary of the Current Statute

Article 27 concerns the detailing of trial and defense counsel to courts-martial and prescribes minimum qualification requirements for counsel so detailed. The statute contains three subsections. Article 27(a) directs that trial counsel and defense counsel shall be detailed for each general and special court-martial, and provides limits on the ability of counsel, investigating officers, military judges, and members to later participate in a different capacity in the same case. Article 27(b) provides that counsel detailed for general courts-martial must be certified as competent by the Judge Advocate General of the armed force of which the counsel is a member, and must be either: (1) a judge advocate who is a graduate of an accredited law school or a member of the bar of a Federal court or the highest court of a state; or (2) a member of the bar of a Federal court or of the highest court of a state. Article 27(b) also requires that a non-judge advocate detailed as a trial or defense counsel be a member of the bar of a Federal court or the highest court of a state. In the case of special courts-martial, Article 27(c) allows the detailing of defense counsel who do not meet the requirements of Article 27(b) when required by physical conditions or military exigencies, but generally requires the detailed defense counsel to have qualifications equivalent to those of the detailed trial counsel. The statute is silent regarding qualification requirements to act as trial counsel at general courts-martial, and to act as trial counsel or assistant trial counsel at special courts-martial.

3. Historical Background

Article 27 is based on Article 11 of the Articles of War.[1] In most respects, the current statute is not significantly different from the original version that was enacted in 1950.[2] In the Military Justice Act of 1968, Congress removed the term "law officer" from subsection (a) and replaced it with the term "military judge" to reflect the addition of a judicial officer to the military justice system.[3] Congress also added what is now subsection (c)(1) to the statute to make allowance for situations where physical conditions or military exigencies prevent assignment of qualified counsel.[4] This provision had previously been in the Articles of War, but was not included in Article 27 when the UCMJ was enacted in 1950. In the Military Justice Act of 1983, Congress amended the statute to require the service Secretaries to prescribe regulations for detailing of trial and defense counsel to general and special courts-martial.[5]

4. Contemporary Practice

The President has implemented Article 27 through R.C.M. 502 (Qualifications and duties of personnel of courts-martial) and R.C.M. 503 (Detailing members, military judge, and counsel). The specific procedures and regulations for detailing of counsel are provided by service regulations.

5. Relationship to Federal Civilian Practice

Currently, all federal courts require attorneys who practice before them to be admitted to a state bar or eligible to practice before the highest court of a state. However, the rules for admission to practice before federal district courts across the 94 districts of the federal court system are not uniform. Some districts only require membership in good standing with any state bar, while other districts have additional requirements for independent examinations, sponsorship, fees, and availability for pro bono assignment.[6]

Similar to the requirements under article 27(b), Assistant United States Attorneys are required to be members of the bar of a federal court or of the highest court of a state, and must also have at least one year of legal or other relevant experience.[7] There is no

[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1154-55 (1949); H.R. REP. 81-491, at 18 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(2), 82 Stat. 1335, 1335 (1968).

[4] *Id.* at § 2(10)(b), 82 Stat. at 1337.

[5] Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c)(2), 97 Stat 1393, 1394 (1983).

[6] *See generally* JOHN OKRAY, U.S. FEDERAL COURTS: ATTORNEY ADMISSION REQUIREMENTS (2011).

[7] United States Department of Justice, Experienced Attorney Hiring Process, http://www.justice.gov/legal-careers/hiring-process (last visited Mar. 17, 2015). These are minimum requirements only; hiring offices within individual districts exercise discretion to require additional qualifications or experience.

requirement that the attorney be a law school graduate (eight states still allow students to "read the law" by apprenticing with a licensed attorney and sit for the bar exam without having graduated from law school),[8] nor is there a requirement that any law school attended be accredited, unless graduation from an accredited law school is a requirement to sit for that attorney's state bar.[9] Public defender qualification requirements are similar, requiring any public defender to be "a member in good standing in the bar of the state."[10] Graduation from an accredited law school is not listed as a requirement. 18 U.S.C. § 3005 imposes additional qualification requirements upon defense counsel assigned in capital cases, requiring they be "learned in the law applicable to capital cases."

With respect to the right to counsel, 18 U.S.C. § 3006A requires representation to be provided for any financially eligible (indigent) person who is charged with a felony or Class A misdemeanor.[11] When a magistrate judge determines it is required by the interests of justice, representation may be required for those charged with a Class B misdemeanor (confinement for 6 months or less, but more than 30 days) or a Class C misdemeanor (confinement for 30 days or less but more than 5 days).[12] The federal civilian system only provides defense counsel upon showing of indigency. The UCMJ provides for the detailing of defense counsel in every general and special court-martial, recognizing the fact that servicemembers are often assigned involuntarily to locations that are far from family, friends and other sources of support.

6. Recommendation and Justification

Recommendation 27.1: Amend Article 27(a)(2) to broaden the disqualification provision to include appellate judges who have participated in the same case.

- This proposed change recognizes that military appellate judges may have previously participated in the same case in a different capacity prior to being assigned as an appellate judge.

[8] National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 2015 (2015), *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf. These states are California, Maine, New York, Vermont, Virginia, Washington, West Virginia and Wyoming. In addition, five jurisdictions allow graduates of online or correspondence law schools to apply for bar admission.

[9] *Id.* Currently, only 17 U.S. jurisdictions require a J.D. or LL.B. degree from an American Bar Association-approved law school as a prerequisite for state bar admission. All remaining jurisdictions permit graduates of non-ABA-approved law schools to sit for the bar, although three jurisdictions require the non-ABA-approved law schools to be located within the jurisdiction (Massachusetts, Tennessee, and Puerto Rico).

[10] U.S. DEP'T OF JUSTICE, U.S. COURT GUIDE TO JUDICIARY POLICY, Vol. 7A, § 420.10.50, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/GuideToJudiciaryPolicyVolume7.aspx.

[11] 18 U.S.C. § 3006A(a)(1)(A). Note: a Class A misdemeanor in the federal district courts is one in which the maximum punishment is one year or less but more than six months. 18 U.S.C. § 3559(a)(6).

[12] 18 U.S.C. § 3006A(a)(2).

Recommendation 27.2: Amend Article 27 to require that: (1) all defense counsel detailed to general or special courts-martial must be qualified under Article 27(b); and (2) all trial counsel and assistant trial counsel detailed to special courts-martial, and all assistant trial counsel detailed to general courts-martial, must be determined to be competent to perform such duties under regulations prescribed by the President.

- This proposal would remove the authority to detail counsel who are not certified under Article 27(b) to represent the accused in special courts-martial. This proposal is consistent with current practice, as well as with this Report's proposal to require the detailing of a military judge in all special courts-martial. This proposal would not prohibit non-lawyers, such as investigators, defense paralegals or law students, from assisting the defense in a capacity other than as defense counsel or assistant defense counsel.

- This proposal retains the authority for the services to detail certain individuals, such as law students preparing to become judge advocates, as trial counsel or assistant trial counsel in special courts-martial if the Judge Advocate General or a designee of the Judge Advocate General determines the individual is competent to perform such duties. Part II of the Report will address the minimum requirements that would provide a uniform baseline across the services, with the Judge Advocates General retaining the opportunity to prescribe additional rules and procedures for detailing these counsel.

Recommendation 27.3: Amend Article 27 by adding a "learned counsel" requirement for defense counsel in capital cases. Specifically, add a new subsection (d) providing that, "[t]o the greatest extent practicable, at least one defense counsel detailed for a court-martial in a case in which the death penalty may be adjudged shall be learned in the law applicable to capital cases."

- This proposal would align defense counsel qualification requirements in capital cases in military practice with the requirement for learned counsel under 18 U.S.C. § 3005, insofar as practicable given the small number of capital cases that are tried in military practice.

- Part II of the Report will address changes in the rules implementing Article 27, with particular attention to the applicable procedures for assigning qualified defense counsel in capital cases.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment in evaluating minimum qualification requirements for trial and defense counsel.

- This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to defenses counsel in the civilian sector insofar as practicable in military criminal practice.

- The proposed amendments are consistent with the changes proposed to Articles 16 and 26 to require a military judge to preside at all special courts-martial.

8. Legislative Proposal

SEC. 505. QUALIFICATIONS OF TRIAL COUNSEL AND DEFENSE COUNSEL

Section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence of paragraph (2) of subsection (a), by striking "No person" and all that follows through "trial counsel," the first place it appears and inserting the following: "No person who, with respect to a case, has served as a preliminary hearing officer, court member, military judge, military magistrate, or appellate judge, may later serve as trial counsel,";

(2) in the first sentence of subsection (b), by striking "Trial counsel or defense counsel" and inserting "Trial counsel, defense counsel, or assistant defense counsel"; and

(3) by striking subsection (c) and inserting the following new subsections:

"(c)(1) Defense counsel and assistant defense counsel detailed for a special court-martial shall have the qualifications set forth in subsection (b).

"(2) Trial counsel and assistant trial counsel detailed for a special court-martial and assistant trial counsel detailed for a general court-martial must be

determined to be competent to perform such duties by the Judge Advocate General, under such rules as the President may prescribe.

"(d) To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

9. Sectional Analysis

Section 505 would amend Article 27, which concerns the detailing of trial and defense counsel to courts-martial, prescribes minimum qualification requirements for counsel, and disqualifies persons who have acted as the investigating officer, military judge, or a court member from later acting as trial or defense counsel in the same case.

Section 505(1) would broaden the disqualification provision under Article 27(a)(2) to include appellate judges who have participated previously in the same case.

Section 505(2) would amend Article 27(b) to extend the qualification requirement to any assistant defense counsel detailed to a general court-martial.

Section 505(3) would amend Article 27(c)(1) by requiring any defense counsel or assistant defense counsel detailed to a special court-martial to be qualified under Article 27(b). Article 27(c)(2), as amended, would retain the authority for the Services to detail individuals such as law students preparing to become judge advocates to serve as trial counsel in special courts-martial and assistant trial counsel in both general and special courts-martial without a requirement for certification under Article 27(b), so long as such individuals are determined to be competent to perform such duties by the Judge Advocate General. These changes are consistent with current practice, applicable federal civilian practice, and with the proposed changes to Articles 16 and 26, which would require a military judge to preside at all special courts-marital.

Section 505(3) also would add a new subsection (d) to Article 27. The new provision would require, to the greatest extent practicable, in any capital case, at least one defense counsel shall be learned in the law applicable to capital cases, reflecting the standard applicable in capital cases tried in the Article III courts and before military commissions.

Article 28 – Detail or Employment of Reporters and Interpreters

10 U.S.C. § 828

1. Summary of Proposal

This Report recommends no change to Article 28. Part II of the Report will consider whether any changes are needed in the rules implementing Article 28.

2. Summary of the Current Statute

Article 28 requires the convening authority of a court-martial, military commission, or court of inquiry to detail or employ qualified court reporters to record the proceedings and testimony taken before the court or commission. The article also authorizes the convening authority to detail or employ interpreters. The statute does not apply to the military commissions established under Chapter 47A of title 10.

3. Historical Background

Congress derived Article 28 from Article 115 of the 1948 Articles of War, which differed only in that it empowered the President of the court-martial panel, rather than the convening authority, to appoint a court reporter.[1] The only substantive amendment to Article 28 came in 2006, to provide the exception for statutory military commissions.[2]

4. Contemporary Practice

The President has implemented Article 28 through R.C.M. 501(c), which provides that reporters and interpreters may be detailed or employed as appropriate, and R.C.M. 502(e), which provides the duties of reporters and interpreters so detailed and authorizes the Secretary concerned to prescribe regulations for the qualification and compensation of reporters and interpreters. In special courts-martial, the convening authority may determine that a reporter or interpreter is not required.[3]

5. Relationship to Federal Civilian Practice

Similar to general and special court-martial practice, federal court reporters record proceedings at the following stages of trial: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the

[1] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1158 (1949).

[2] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(2), 120 Stat. 2600, 2631 (2006).

[3] R.C.M. 501(c) (Discussion).

approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.[4] Each session of court and every proceeding designated by rule or order of the court or by one of the judges is required be recorded verbatim by shorthand, mechanical means, or electronic sound recording equipment.[5] The district courts are provided discretion to select the method of recording.[6] By comparison, current military law requires a verbatim transcript in most cases, with exceptions for summary courts-martial and general and special courts-martial resulting in a sentence of less than six months confinement, less than six months forfeiture of pay, and which does not include a punitive discharge.[7] The Court Interpreters Act provides that the Director of the Administrative Office of the United States Courts shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in judicial proceedings instituted by the United States.[8]

6. Recommendation and Justification

Recommendation 28: No change to Article 28.

- Part II of the Report will consider whether amendments to the MCM are necessary to ensure appropriate implementation of the proposed amendments to Articles 54 and 65 concerning the production and disposition of trial records. The proposed revision to Article 54(a) designates the court reporter as the individual statutorily empowered to certify the record.

7. Relationship to Objectives and Related Provisions

- This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[4] 28 U.S.C. § 753.

[5] 28 U.S.C. § 753(b).

[6] *Id.*

[7] *See* Article 54(c)(2) (authorizing the President to prescribe whatever materials he deems appropriate for courts martial resulting in confinement or forfeiture of pay for less than six months, and no punitive discharge); R.C.M. 1103(b)-(c) (providing the rules for verbatim and summarized transcripts for general and special courts-martial). The proposed amendments to Articles 54 and 65 would align military practice more closely with federal civilian practice in this area.

[8] 28 U.S.C. § 1827.

Article 29 – Absent and Additional Members
10 U.S.C. § 829

1. Summary of Proposal

This proposal would amend Article 29 to align the statute with the proposed amendments to Articles 16 and 25a regarding the required number of members at general and special courts-martial. The proposal would clarify the function of assembly and impanelment in courts-martial with members, and the limited situations in which members may be absent after assembly. The amendments would allow the convening authority to detail alternate members to the court-martial, and would further clarify the option under current law for consideration of the record by a new member or military judge, by allowing for the member or judge to consider the record through the use of an electronic or other similar recording.

2. Summary of the Current Statute

Article 29 authorizes the excusal of members from assembled general and special courts-martial as the result of a challenge, physical disability, or for good cause. The current statute requires the convening authority to detail new members in order for a trial to proceed whenever a panel falls below five members in the case of a general court-martial, and below three members in the case of a special court-martial. Article 29 also governs how evidence is presented whenever a new member or new military judge is detailed to a court-martial after the court is assembled.

3. Historical Background

Article 29 reflects longstanding military practice regarding the authority to excuse members and to detail new members to a court-martial panel as necessary.[1] At one time, military custom allowed for the impanelment of additional officers as "'supernumeraries,' whose purpose was to supply the places of such original members as might be excluded on challenge, or whose seats might be vacated by absence."[2] This practice had no statutory basis, and was abandoned in the 1840s. In its current form, Article 29 has remained substantially unchanged since the UCMJ was enacted in 1950.[3]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1158-59 (1949).

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 79-80 (photo reprint 1920) (2d ed. 1896).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. In 2001, subsection (b) was amended to reflect the enactment of Article 25a. NDAA FY 2002, Pub. L. No. 107-107, § 582(c), 115 Stat. 1012.

4. Contemporary Practice

Under current law, both Article 29 and R.C.M. 505(c)(2)(A) permit the excusal of members after assembly for good cause. R.C.M. 505(f) defines good cause as including "physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time."[4] Under R.C.M. 505(f), this does not include temporary inconveniences that are "incident to normal conditions of military life." These requirements are designed to ensure that members are not relieved or excused in an attempt to affect the outcome of a case.[5] However, Article 29 and current practice recognize the unique nature of the military mission and the need for a means to excuse members due to military exigencies.

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice concerning excusal of members (or jurors) differ in several ways. Although both systems allow for excusals, the UCMJ does not have a statutory mechanism for seating alternate members. In contrast, in the federal civilian system, a district court judge may remove and replace a seated juror with an alternate whenever doubt arises about that juror's ability to perform his or her duties.[6] A federal court may impanel up to six alternates, with each side entitled to additional peremptory challenges based on the number of alternates to be impaneled. District court judges are granted wide latitude in their handling of member selection, and absent a demonstration of bias or prejudice to the defendant, their discretion will typically not be disturbed.

6. Recommendation and Justification

Recommendation 29.1: Amend Article 29 to: (1) clarify the function of assembly and impanelment in general and special courts-martial with members, and the limited situations in which members may be absent from the court-martial after assembly; (2) provide for the impaneling of 12 members in a capital general court-martial, 8 members in a non-capital general court-martial, and 4 members in a special court-martial; (3) authorize (but not require) the convening authority to direct the use of alternate members; and (4) authorize non-capital general courts-martial to proceed with a minimum of six members if one or more members are excused for good cause after the members have been impaneled.

- Under current law, Articles 16, 25, and 29 refer to the court-martial being "assembled," but there is no UCMJ provision that directly addresses assembly. This proposal would clarify the function of assembly and impanelment in members cases, and the situations in which a member may be absent or excused after assembly.

[4] United States v. Vasquez, 72 M.J. 13, 19 (C.A.A.F. 2013) (articulating that "Article 29(b), UCMJ . . . represents Congress' view of what 'process is due' in the event a panel falls below quorum.").

[5] United States v. Garcia, 15 M.J. 864, 865 (A.C.M.R. 1983).

[6] FED. R. CRIM. P. 24(c). *See* United States v. Godwin, 765 F.3d 1306, 1316 (11th Cir.), *cert. denied*, 135 S. Ct. 491 (2014); *see also* FED. R. CRIM. P. 23(b)(2) ("In addition, at any time before the verdict, the parties may, with the court's approval, stipulate in writing to a jury of less than [twelve] persons.").

- The option for the convening authority to utilize alternate members would enhance efficiency and better align military practice with federal civilian practice.

Recommendation 29.2: Amend Article 29 to clarify that a newly-detailed court-martial member or military judge may consider the record of previously admitted evidence through the use of an electronic or other similar recording.

- This proposal will increase efficiency when court members are replaced mid-trial. The option to use recordings to present the record to new members would enable the court to proceed by utilizing modern technology without having to await the production of a written transcript.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by incorporating, insofar as practicable, practices and procedures concerning alternate members and replacement of members mid-trial as used in criminal trials in U.S. district court.

8. Legislative Proposal

SEC. 506. ASSEMBLY AND IMPANELING OF MEMBERS; DETAIL OF NEW MEMBERS AND MILITARY JUDGES.

Section 829 of title 10, United States Code (article 29 of the Uniform Code of Military Justice), is amended to read as follows:

"§829. Art. 29. Assembly and impaneling of members; detail of new members and military judges

"(a) ASSEMBLY.—The military judge shall announce the assembly of a general or special court-martial with members. After such a court-martial is assembled, no member may be absent, unless the member is excused—

"(1) as a result of a challenge;

"(2) under subsection (b)(1)(B); or

"(3) by order of the military judge or the convening authority for disability or other good cause.

"(b) IMPANELING.—(1) Under rules prescribed by the President, the military judge of a general or special court-martial with members shall—

"(A) after determination of challenges, impanel the court-martial; and

"(B) excuse the members who, having been assembled, are not impaneled.

"(2) In a general court-martial, the military judge shall impanel—

"(A) 12 members in a capital case; and

"(B) eight members in a noncapital case.

"(3) In a special court-martial, the military judge shall impanel four members.

"(c) ALTERNATE MEMBERS.—In addition to members under subsection (b), the military judge shall impanel alternate members, if the convening authority authorizes alternate members.

"(d) DETAIL OF NEW MEMBERS.—(1) If, after members are impaneled, the membership of the court-martial is reduced to—

"(A) fewer than 12 members with respect to a general court-martial in a capital case;

"(B) fewer than six members with respect to a general court-martial in a noncapital case; or

"(C) fewer than four members with respect to a special court-martial;

the trial may not proceed unless the convening authority details new members and, from among the members so detailed, the military judge impanels new members sufficient in number to provide the membership specified in paragraph (2).

"(2) The membership referred to in paragraph (1) is as follows:

"(A) 12 members with respect to a general court-martial in a capital case.

"(B) At least six but not more than eight members with respect to a general court-martial in a noncapital case.

"(C) Four members with respect to a special court-martial.

"(e) DETAIL OF NEW MILITARY JUDGE.—If the military judge is unable to proceed with the trial because of disability or otherwise, a new military judge shall be detailed to the court-martial.

"(f) EVIDENCE.—(1) In the case of new members under subsection (d), the trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides.

"(2) In the case of a new military judge under subsection (e), the trial shall proceed as if no evidence had been introduced, unless the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new military judge, the accused, and counsel for both sides.".

9. Sectional Analysis

Section 506 contains amendments to Article 29 pertaining to the assembly, impaneling, and excusal of members, and the detailing of new court members and military judges. As amended, Article 29 would contain the following provisions:

Article 29(a) would clarify the function of assembly in general and special courts-martial with members, and the limited situations in which a member may be absent or excused after assembly of the court-martial.

Article 29(b)-(c) would require the military judge to impanel the number of members required under Articles 16 and 25a: twelve members in a capital case; eight members in a non-capital general court-martial; and four members in a special court-martial. The military judge would impanel any alternate members authorized by the convening authority in a specific case, and would then excuse any member who was detailed but not impaneled.

Article 29(d) would provide for the detail of new members if, as a result of excusals after the members have been impaneled, the membership on the panel is reduced below the following: twelve members in a capital general court-martial; six members in a non-capital general court-martial; and four members in a special court-martial. Because excusal of a member for good cause mid-trial is not a common occurrence, this provision should be used only in unusual situations. As under current law, the prohibition on further trial proceedings when the panel membership falls below the required number of members does not preclude sessions under Article 39.

Article 29(e) would address the detailing of a new military judge when the military judge is unable to proceed as a result of physical disability or otherwise.

Article 29(f) would establish the procedure for presenting the prior trial proceedings to the newly detailed members or judge. In addition to retaining the current procedure for reading a transcript of the prior proceedings, the amendment would permit the previously admitted evidence to be presented to the new members through play-back of a recording.

Subchapter VI. Pretrial Procedure

Article 30 – Charges and Specifications
10 U.S.C. § 830

1. Summary of Proposal

This proposal would clarify the language and organization of Article 30 in the context of current practice and related statutory provisions, with no substantive changes. Part II of the Report will address whether changes are needed in the rules implementing Article 30.

2. Summary of the Current Statute

Article 30 provides basic statutory requirements for the initial signing and swearing of criminal charges against a military accused, and for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over persons subject to the Code. The article is divided into subsections to deal with these two distinct aspects of military charging practice. Article 30(a) provides that charges and specifications may be "preferred"—that is, signed and sworn to under oath—by any person subject to the Code. It then provides the knowledge requirements for the person signing the charges, usually known as the "accuser": (1) that the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and (2) that the charges and specifications are "true in fact" to the best of the signer's knowledge and belief.[1] Article 30(b) directs "the proper authority," which ordinarily is the commander who exercises non-judicial punishment authority over of the accused, but can also include any higher commander, to take "immediate steps" to determine what disposition should be made of the charges and specifications "in the interest of justice and discipline."[2] It then requires that the accused be informed of the charges against him "as soon as practicable."

3. Historical Background

Congress derived Article 30, in part, from Article 46 (Charges; Action Upon) of the Articles of War, as amended by the Elston Act of 1948.[3] The title and subject of Article 30 ("Charges and specifications") refers to the particular nomenclature of the military's distinctive two-

[1] *See* Article 1(9) ("The term 'accuser' means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused."). This definition allows that the "signer" of the charges may be a nominal, but not the actual, accuser.

[2] *See* R.C.M. 306(a), 401(a) (providing that a superior commander may withhold the authority to dispose of offenses in individual cases, with respect to certain types of cases, or generally).

[3] *Compare* Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 *with* Act of June 24, 1948, ch. 625, tit. II, §222, 62 Stat. 627; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 980 (1949) [hereinafter *Hearings on H.R. 2498*].

part charging procedure, which has long been a part of American "military usage and practice."[4] Under this practice, a person initiates a charge against an accused by writing out a short description of the Article violated (the "charge") and a plain, concise statement of the essential facts constituting the offense charged (the "specification").[5] Charges are "preferred," or officially brought against the accused as a criminal matter, when a person subject to the UCMJ signs and swears to them, as required by Article 30(a). Under early versions of the Articles of War, only officers could prefer charges.[6] In 1920, Congress relaxed this requirement, providing that "[c]harges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief."[7] When Congress enacted the UCMJ in 1950, it divided this statutory provision into its component parts and added the requirement that the signer's oath be taken before "an officer of the armed forces authorized to administer oaths."[8] In 1956, Congress amended the article to clarify that this officer must be "commissioned." Other than this change, the current version of Article 30(a) is basically identical to the version that Congress originally enacted in 1950.

The origins of Article 30(b)'s disposition and notification provisions are more recent. Under the Articles of War, military commanders were given little guidance concerning their disposition duties, and military members were not required to be notified when charges were preferred against them. The 1891 Manual, for example, advised commanders simply to ensure "that there are good grounds for sustaining the charges" before acting upon them, including by referring the charges to court-martial for trial.[9] Winthrop advised that "[o]nly such charges as, upon sufficient investigation, are ascertained to be supported by the facts—are found to be sustained by at least *prima facie* evidence—should be preferred for trial," and that "[a]ll charges should be substantial and made in good faith."[10] Neither of these admonitions, however, was ever incorporated into the Articles of War in connection with preferral of charges or the commander's initial disposition authority. The 1920 Articles of War were the first to introduce the phrase "in the interest of justice and discipline" in connection with the commander's duty to dispose of charges and specifications that have been preferred against a military accused. It did so in the

[4] Carter v. McClaughry, 183 U.S. 365, 386 (1902). *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 132-50 (photo reprint 1920) (2d ed. 1896).

[5] R.C.M. 307(c); *accord* MCM 1891, at 17-21; MCM 1917, ¶¶61-74.

[6] *See* WINTHROP, *supra* note 4, at 153; MCM 1905, at 20 ("Charges should be signed by a commissioned officer, but a contract surgeon or a dental surgeon may sign charges against an enlisted man."); MCM 1917, ¶63 ("Any officer may prefer charges.").

[7] AW 70 of 1920 (later moved to AW 46(a) of 1948).

[8] *Hearings on H.R. 2498*, *supra* note 3, at 980.

[9] MCM 1891, at 22.

[10] WINTHROP, *supra* note 4, at 150-51.

paragraph concerning pre-referral "investigations," which would later become the basis for Article 32 pretrial investigations.[11]

When Congress enacted the UCMJ, it sought to provide consistent statutory guidance to commanders and convening authorities in the exercise of their initial disposition and referral responsibilities, so it included the "in the interest of justice and discipline" standard in Article 30(b) as well as Article 32(a).[12] Congress also sought to prevent the situation experienced by many servicemembers under the Articles of War: lengthy stays in jail, or worse, on orders of their commanders without any notice of the charges for which they were being held, and without prompt action on the part of the commanders to dispose of the charges appropriately.[13] It addressed this concern in Article 30(b)—in conjunction with Articles 10 and 33—by requiring the commander "to take immediate steps" to dispose of the charges and specifications, and to inform the accused of the charges and specifications "as soon as practicable."[14] Congress bound together the interests of justice and discipline in Article 34, requiring the convening authority to obtain the advice of his or her staff judge advocate—with respect to both the threshold legal questions of probable cause, proper charging, and jurisdiction, and the disposition decision itself—before referring charges and specifications to general court-martial for trial.

In its current form, Article 30, in conjunction with Article 34, codifies both the commander-judge advocate partnership and the dual-purpose of the American military justice system: to promote justice while maintaining discipline within the ranks.[15] Throughout the history of the Code, legislators, servicemembers, and the public have regarded the dual-purpose

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[11] AW 70, ¶2 of 1920.

[12] *See* Article 32(a) (prior to the NDAA FY 2014 amendments).

[13] *See Hearings on H.R. 2498*, *supra* note 3, at 981-83; *see also* PHILIP MCFARLAND, SEA DANGERS: THE AFFAIR OF THE SOMERS (1985) (detailing the so-called "Somers Affair," in which the son of the Secretary of War and two other shipmates aboard the U.S.S. Somers were charged and court-martialed for mutiny, with no notice of the charges (or of the court-martial) until moments before their execution).

[14] *See also* Article 10 ("When any person subject to this chapter is placed in arrest or confinement prior to trial, *immediate steps* shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.") (emphasis added).

[15] *See* MCM, Part I, ¶3 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."); *see also* United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953) ("It was generally recognized [by Congress] that military justice and military discipline were essentially interwoven. . . . [C]onfronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws."); AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11-12 (18 Jan. 1960) ("In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable . . . ."); DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 14 (1972) ("[N]o need is seen to consider the sacrifice of justice for the sake of discipline. The two are, for American servicemen, inextricable, and the latter cannot exist without the former.").

nature of military law and the commander's role in charging decisions with both admiration and skepticism.[16] Over the years, attention to the disposition discretion of military commanders has tended to focus on Article 30.[17]

4. Contemporary Practice

The President has implemented Article 30 across a number of different rules in the Manual for Courts-Martial. R.C.M. 307 implements Article 30(a), providing the rules and procedures concerning who may prefer charges and specifications, how they are to be preferred, and the manner in which they are to be technically alleged in the charge sheet. R.C.M. 308 implements Article 30(b)'s notice requirement and, in conjunction with R.C.M. 707 (Speedy trial) and R.C.M. 401(b) (Prompt determination), the requirement that notice of the charges be provided to the accused "as soon as practicable."[18] R.C.M. 306(c), 402-405, 407, and 601 provide the actions that commanders and convening authorities of various levels may take to dispose of the charges and specifications against an accused, including: dismissal of the charges; administrative action (such as counseling, reprimands, extra military instruction, or the administrative withholding of privileges); forwarding the charges to a superior or subordinate commander for disposition; directing a pretrial investigation (or preliminary hearing) on the charges; and referral of charges to a summary, special, or general court-martial for trial.[19] And finally, R.C.M. 306(b) (Initial disposition: policy) and 401 (Forwarding and disposition of charges in general) guide commanders and convening authorities with respect to how to determine what disposition to make of the charges and specifications "in the interest of justice and discipline." R.C.M. 401 restates this statutory standard and then directs commanders to, once they have ensured that the accused has been notified of the charges, dispose of the charges "in accordance with the policy in R.C.M. 306(b)."[20]

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[16] *See generally* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013).

[17] *See, e.g.*, S. 987, 93rd Cong. § 2, the proposed Military Justice Act of 1973 (as introduced in the Senate, February 22, 1973) (recommending amendment of Article 30 to remove military commanders from the disposition process and to transfer disposition discretion to an independent "Courts-martial Commands" that would be established in the Office of the Judge Advocate General of each armed force); *see also* Kenneth Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973) (expressing disagreement with the 1973 proposals); S. 1752, 113th Cong. § 2, the proposed Military Justice Improvement Act of 2013 (as introduced in the Senate, November 20, 2013); 160 CONG. REC. S1335-49 (daily ed. Mar. 6, 2014).

[18] *See* R.C.M. 707(a) (requiring that the accused be brought to trial within 120 days after preferral of charges, or earlier if the accused is placed under restraint); *see also* United States v. Maresca, 28 M.J. 328, 331-32 (C.M.A. 1989) (discussing the connection between Article 30(b) and speedy trial considerations and stating that "the Article and R.C.M. 308 must be construed to require that the immediate commander notify an accused of the charges as soon after they have been preferred as the accused can reasonably be found and informed thereof.").

[19] *See* R.C.M. 306(c), 402-405, 407.

[20] R.C.M. 401(c); *see also* R.C.M. 401(b) (Discussion) (noting that the commander should ensure that the accused is notified of the charges "[b]efore determining an appropriate disposition").

R.C.M. 306(b) forms the President's core policy guidance with respect to disposition of offenses under the Code "in the interest of justice and discipline." The Discussion to the rule provides a non-exclusive list of factors military commanders should consider when deciding how to dispose of offenses. These "disposition factors" are then incorporated by reference into the rules concerning disposition of preferred charges and specifications and referral of charges and specifications to court-martial for trial.[21] The Discussion notes, "The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced . . . . The goal should be a disposition that is warranted, appropriate, and fair."[22] The rule itself directs commanders to dispose of allegations of offenses "in a timely manner at the lowest appropriate level of disposition . . . ."[23] Under current law, the disposition factors include:

- the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- when applicable, the views of the victim as to disposition;
- existence of jurisdiction over the accused and the offense;
- availability and admissibility of evidence;
- the willingness of the victim or others to testify;
- cooperation of the accused in the apprehension or prosecution of another accused;
- possible improper motives or biases of the person(s) making the allegation(s);
- availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and
- appropriateness of the authorized punishment to the particular accused or offense.[24]

These factors are based, in part, on the 1979 version of the ABA Standards for the Prosecution Function § 3-3.9(b), and are similar—but not identical—to the factors used by

[21] *See* R.C.M. 401(b)-(c); R.C.M. 407(a)(6) (Discussion); R.C.M. 601(d)(1) (Discussion).

[22] R.C.M. 306(b) (Discussion).

[23] R.C.M. 306(b).

[24] *See* Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,013-14 (June 18, 2014).

civilian prosecutors in determining whether or not to charge someone with a criminal offense in federal or state court.[25]

5. Relationship to Federal Civilian Practice

Military charging practice under Article 30(a) and R.C.M. 307 combines aspects of the civilian complaint under Fed. R. Crim. P. 3 and the indictment or information under Fed. R. Crim. P. 7. Like the civilian indictment or information, charges and specifications preferred under Article 30(a) "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and it must be signed by an attorney for the government."[26] And like the indictment in federal civilian practice, preferral of charges under Article 30(a) formally initiates a criminal matter against an accused, putting the accused on notice of potential prosecution, and generally triggering his right to counsel under service regulations. In other ways, however, charges and specifications under Article 30(a) and R.C.M. 307 function more like the complaint under Fed. R. Crim. P. 3. Like the complaint, charges and specifications are "a written statement of the essential facts constituting the offense charged,"[27] and the signer is required to swear before an authorized official that they are true "to the best of [the signer's] knowledge and belief."[28] Also like the complaint, preferred charges and specifications alone are not sufficient to bring an accused to trial. In both systems, a second step is needed: the referral of charges to a court-martial under Article 34, and the filing of the information or indictment with a federal district court under Fed. R. Crim. P. 7. [29] Furthermore, in both systems, formal

[25] *See generally* MCM, App. 21 (R.C.M. 306(b), Analysis). *See also* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 48 (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT], at 126; RESPONSE SYSTEMS PANEL REPORT PANEL ANNEX 168-75. However, R.C.M. 306 omits the explicit "quantum of evidence" calculus which guides the charging decision of civilian prosecutors and United States Attorneys. *See* ABA STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL [hereinafter USAM], at § 9-27.220 (Grounds for Commencing or Declining Prosecution) ("The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because: (1) No substantial Federal interest would be served by prosecution; (2) The person is subject to effective prosecution in another jurisdiction; or (3) There exists an adequate non-criminal alternative to prosecution."). Further discussion of this issue is taken up in the proposal to amend Article 33, *infra*.

[26] FED. R. CRIM. P. 7(c)(1); *see, e.g.*, WINTHROP, *supra* note 4, at 132 ("The Charge, in the military practice, like the indictment of the criminal courts, is simply a description in writing of the alleged offence of the accused."); MCM 1905, p. 16 ("A military charge corresponds to a *civil indictment*.").

[27] FED. R. CRIM. P. 7(c)(1).

[28] *See* United States District Court Criminal Complaint Form, *available at* http://www.uscourts.gov/forms/law-enforcement-grand-jury-and-prosecution-forms/criminal-complaint.

[29] In the federal civilian system, a grand jury indictment is required for felony offenses unless the defendant waives the indictment and consents to prosecution by information. FED. R. CRIM. P. 7(b).

discovery rules are generally not triggered until after referral of charges or the indictment/information;[30] preliminary hearing procedures take place, by design, between the preferral/complaint stage and the referral/information stage;[31] and until the charges are formally referred or filed, they can be modified without approval of the court.[32]

The essential differences between the two systems in the area of pretrial process are that in the federal system, the complaint - preliminary hearing - information procedures can be bypassed through the securing of a grand jury indictment under Fed. R. Crim. P. 6. The grand jury indictment is not available in the military justice system,[33] and there is no corresponding mechanism to bypass Articles 30 and 32 and refer charges directly to a court-martial. In addition, in the federal civilian system, complaints are reviewed for probable cause by judges, who then issue an arrest warrant or summons to bring the accused to court for an initial appearance.[34] In the military justice system, the initial appearance function is fulfilled under Article 30(b) and R.C.M. 308 (Notification to accused of charges), and there is no need for an arrest warrant or summons because military members are subject to orders. The formal probable cause screening takes place initially at the preliminary hearing stage in general courts-martial, and before referral of charges and specifications to trial in all courts-martial.[35] Furthermore, in all cases, probable cause is required before the accused may be ordered into arrest or confinement pending trial by court-martial under Articles 9 and 10.

With respect to disposition of charges and notice to the accused under Article 30(b) and R.C.M. 306, 308, 401-404, and 407, military practice varies from federal civilian practice in several key aspects. Under R.C.M. 308, the accused's immediate commander is responsible for causing the accused to be notified of the charges preferred against him; this notice function is provided in the federal civilian system by the judiciary under Fed. R. Crim. P. 4 (Arrest Warrant or Summons on a Complaint) and Fed. R. Crim. P. 5 (Initial Appearance). Additionally, the duty to determine whether the accused should be held in confinement is generally performed by the accused's commander or, when authorized by service regulations, an officer designated as a magistrate.[36] In federal civilian practice, this duty is generally performed by a magistrate judge at the initial appearance under Fed. R. Crim. P.

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[30] *Compare* R.C.M. 701(a) (providing for disclosure by the trial counsel of information in the government's possession to the defense counsel *after* service of charges under Article 35 generally) *with* FED. R. CRIM. P. 16. Although formal discovery is generally not triggered under the rule until service of charges, the military has a long tradition of substantial early disclosure and open file sharing between the government and the defense. *See* Summary and Analysis of Article 46, *infra*.

[31] *Compare* R.C.M. 405 *with* FED. R. CRIM. P. 5.1.

[32] *Compare* R.C.M. 603 *with* FED. R. CRIM. P. 7(e).

[33] U.S. CONST. amend. V.

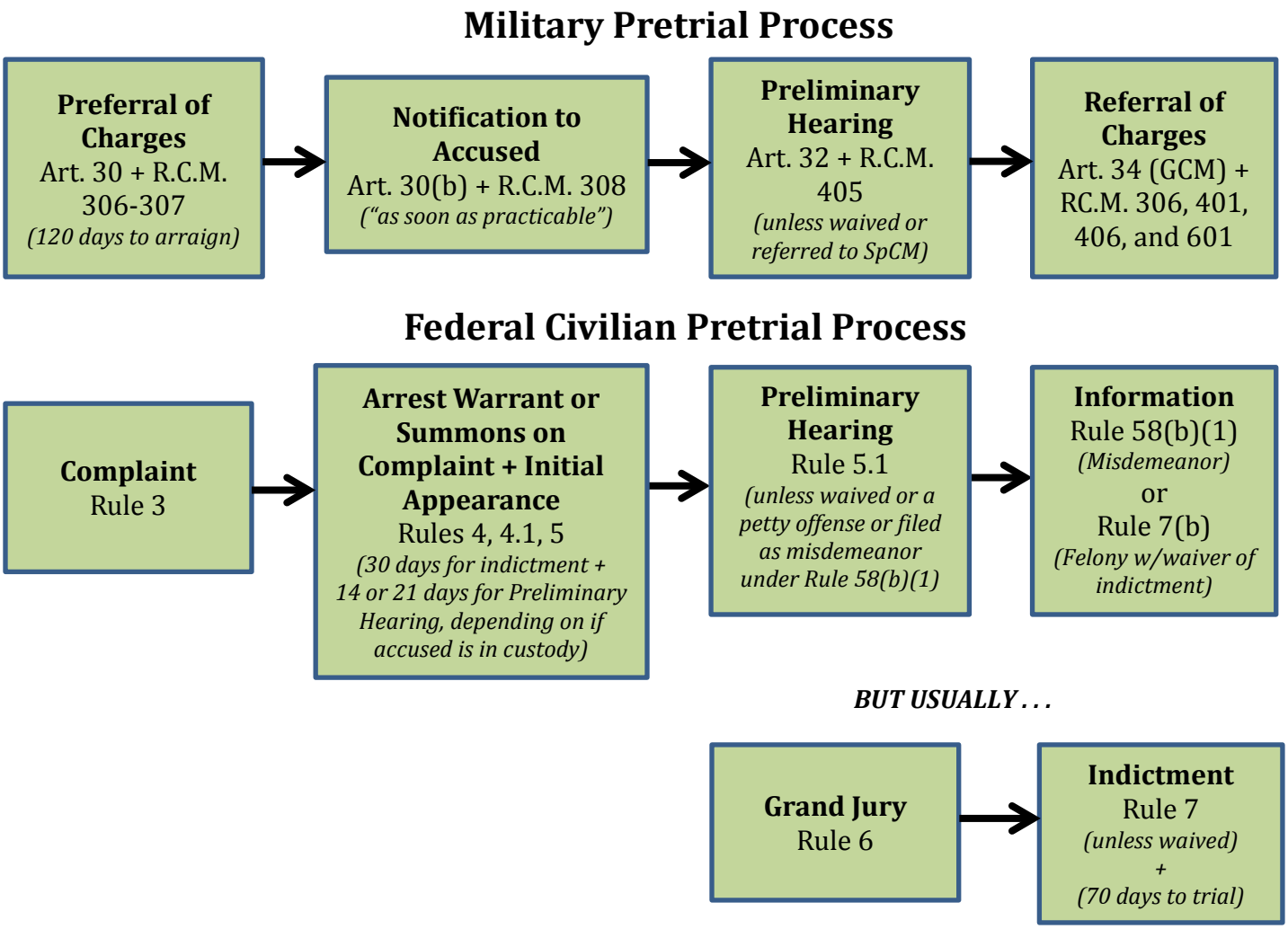
[34] *See* FED. R. CRIM. P. 4 and 5.

[35] R.C.M. 601(d)(1).

[36] *See* R.C.M. 305.

5. Most significantly, whereas federal civilian prosecutors are guided in the exercise of their prosecutorial discretion by robust, uniform disposition guidance—the *Principles of Federal Prosecution*, contained in the United States Attorneys' Manual[37]—military commanders and convening authorities are guided in the exercise of their disposition discretion only by the non-binding "disposition factors" in the Discussion to R.C.M. 306 and by Article 30(b)'s broad admonition to dispose of charges and specifications "in the interest of justice and discipline."[38] This difference is addressed in greater detail in this Report in the proposal to amend Article 33 (Disposition Guidance).

Figure 1. (Simplified Comparison of Military and Federal Civilian Pretrial Processes)



[37] USAM, *supra* note 25, at § 9-27.000.

[38] *See generally* Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389 (2014).

6. Recommendation and Justification

Recommendation 30.1: Amend Article 30 by reorganizing the statute into three subsections: (a) providing the mode of preferring charges and specifications and the oath requirement; (b) providing the required statement of the person who signs the charges; and (c) providing the duty of proper authority to notify the accused of the charges and to dispose of them in the interest of justice and discipline.

- This reorganization of the statutory provisions under Article 30 would clarify the relationship and sequencing of related requirements for preferral of charges and specifications against a military accused, better aligning the statute's provisions with current practice and the President's implementing rules. This will reduce the potential for unnecessary litigation in this area and make the statute clearer and more functional.

Recommendation 30.2: Amend Article 30 by re-sequencing the notification and disposition requirements and providing that both actions take place "as soon as practicable."

- Currently, Article 30(b) requires that commanders take "immediate steps" to determine what disposition should be made of charges and specifications; it then requires them to inform the accused of the charges "as soon as practicable." In practice (and under the Rules for Courts-Martial), this sequence of events is reversed: the accused is notified of the charges as soon as practicable, and only then does the accused's commander or the cognizant convening authority determine how to dispose of the charges. This proposal would align the sequencing of the notification and disposition requirements with current practice.

- As noted in the Discussion to R.C.M. 306(b), "The disposition decision is one of the most important and difficult decisions facing a commander." Although timeliness is critical in military justice, it is not so critical as to require immediacy over thoughtful and deliberate action. Amending the statute so that notification to the accused and disposition of the charges in the interest of justice and discipline are both required "as soon as practicable" would better align these requirements with current practice and reduce the potential for unnecessary litigation in this area.

- The timeliness requirements in Article 30(b) were originally placed in the statute in order address a situation that occurred frequently under the Articles of War: commanders would delay in notifying the accused and disposing of the charges while the accused was in confinement. This was the origin of the "immediate steps" requirement. Since that time, the practices and procedures used to ensure timely processing of cases have evolved, particularly with the introduction of military judges in 1968 and the adoption of R.C.M. 707 (Speedy trial) in 1984. Articles 10 and 33, along with R.C.M. 305, sufficiently ensure that military members in pretrial confinement will have the charges against them disposed of promptly. The "immediate steps" requirement in Article 30(b) is no longer necessary.

Recommendation 30.3: Retain the current procedures for the exercise of disposition discretion based upon the interlocking responsibilities of military commanders, staff judge advocates, and judge advocates.

- The guidance in Article 30(b) and R.C.M. 306 regarding the exercise of the military commander's disposition function in partnership with his or her staff judge advocate (or judge advocate, as the case may be) reflects the ABA Standards for the Prosecution Function, a core guiding document for federal and state prosecutors. This guidance also performs a similar function to the Principles of Federal Prosecution contained in the United States Attorneys' Manual, which effectively guides federal civilian prosecutors in their exercise of prosecutorial discretion.

- Commanders are responsible for instilling and maintaining the level of discipline necessary to ensure accomplishment of the military mission. The issue of whether that responsibility should continue to include the authority to refer cases to courts-martial, or whether that authority should be vested in judge advocates, has been the subject of considerable debate, as reflected in report of the Response Systems Panel, a blue-ribbon advisory committee composed of distinguished non-governmental experts in civilian practice as well as military law.[39] Congress expressly directed the Response Systems Panel to assess the impact of removing disposition authority from the chain of command, focusing on sexual assault cases.[40] The Panel's report, which recommended retention of the commander's role in exercising disposition discretion, includes thoughtful views on both sides of the issue.[41] In view of the extensive testimony and evidence so recently gathered and considered by the congressionally-established Response Systems Panel, the MJRG has focused its efforts on measures to improve the current process, rather than on revisiting the underlying fundamental policy so soon after the Response Systems Panel completed its thorough and careful treatment of the issue.

7. Relationship to Objectives and Related Provisions

- This proposal supports the MJRG Terms of Reference by using the current UCMJ as a point of departure for the MJRG's baseline reassessment.

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[39] *See* RESPONSE SYSTEMS PANEL REPORT, *supra* note 25, at 6-7, 167-71 and Recommendations 36-43 at 22-25.

[40] NDAA FY 2014 at § 1731(a)(1)(A) (directing the Response Systems Panel to assess "the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under . . . the Uniform Code of Military Justice . . . would have on overall reporting and prosecution of sexual assault cases."); *see also* NDAA FY13 at § 576(d)(1)(F-G) (directing the Response Systems Panel to assess "the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault;" and assess "the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and in the investigation, prosecution, and adjudication of adult sexual assault crimes.").

[41] RESPONSE SYSTEMS PANEL REPORT, *supra* note 39, at 6-7, 22-23 (Recommendations 36-37), 167-76 (Additional Views of Response Systems Panel Members Dean Elizabeth L. Hillman and Mr. Harvey Bryant).

- This proposal supports MJRG Operational Guidance by re-emphasizing the critical importance of discipline as a key principle of the military justice system. Furthermore, this proposal would address ambiguities between Article 30 and the rules implementing the statute, reducing the potential for unnecessary litigation and improving the functionality of the mechanisms and procedures associated with charging and disposition of offenses.
- This proposal is related to the sections in this Report discussing Article 34 (Advice of staff judge advocate and reference for trial) and the proposed amendments to Article 33 (Disposition Guidance).

8. Legislative Proposal

SEC. 601. CHARGES AND SPECIFICATIONS.

Section 830 of title 10, United States Code (article 30 of the Uniform Code of Military Justice), is amended to read as follows:

"§830. Art. 30. Charges and specifications

"(a) IN GENERAL.—Charges and specifications—

"(1) may be preferred only by a person subject to this chapter; and

"(2) shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths.

"(b) REQUIRED CONTENT.—The writing under subsection (a) shall state that—

"(1) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

"(2) the charges and specifications are true, to the best of the knowledge and belief of the signer.

"(c) DUTY OF PROPER AUTHORITY.—When charges and specifications are preferred under subsection (a), the proper authority shall, as soon as practicable—

"(1) inform the person accused of the charges and specifications; and

"(2) determine what disposition should be made of the charges and specifications in the interest of justice and discipline.".

9. Sectional Analysis

Section 601 would amend Article 30, which provides basic statutory requirements for the initial signing and swearing of criminal charges against a military accused, and for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over persons subject to the Code. By reorganizing Article 30 into three subsections and removing the requirement for commanders to take "immediate steps" to dispose of charges and specifications, the amendments would improve the functionality of the statute and better align the statute's provisions with current practice.

Article 30a (New Provision) – Proceedings Conducted Before Referral

10 U.S.C. § 830a

1. Summary of Proposal

This proposal would create Article 30a to authorize military judges or military magistrates to consider certain pretrial matters and to make judicial rulings on those matters prior to the referral of charges to a court-martial. The proposed statute would authorize the President to designate the specific pretrial matters that may be considered by a military judge or magistrate prior to referral. The President also would prescribe the procedures for conducting such proceedings, and set forth limitations on available remedies. Article 30a would further authorize the services to establish a military magistrates program. Military magistrates in such a program would be available to preside in pretrial proceedings under Article 30a when designated to do so by a military judge. When designated, magistrates would act on these matters with the full authority of a military judge. The proposed article also would provide for the issuance of regulations for procedures in which military judges could formally review any magistrate rulings. Each service would establish procedures for the detailing of military judges and the designation of magistrates under this program.

2. Summary of the Current Statute

This proposal creates a new article of the UCMJ. Although military judges may be assigned to perform duties in addition to presiding over courts-martial, the UCMJ does not provide an express judicial role for military judges prior to referral of charges.[1] There is no current statutory provision specifically authorizing or describing military magistrates.[2]

3. Historical Background

Before enactment of the UCMJ in 1950, the Articles of War provided for a law member to make legal rulings at a court-martial and for a president of the panel to make administrative and procedural decisions.[3] At the time, courts-martial did not include a military judge. The UCMJ created the position of law officer for all general courts-martial. The law officer was not a member of the panel and did not deliberate or vote on findings or

[1] Article 26(c). Under R.C.M. 707(c)(1), the President has provided military judges with the pre-referral authority to exclude pretrial delays for purposes of determining speedy trial issues, if authorized under service regulations.

[2] Under the executive authority governing military search authorizations, the President has provided military judges and non-statutory magistrates the power to issue search authorizations under M.R.E. 315(d)(2), if authorized under Department of Defense or service regulations.

[3] *See, e.g.*, AW 8, 31 of 1920.

the sentence.[4] A decision by a law officer was usually advisory, and the president of the panel had ultimate control over a number of authoritative and procedural decisions.[5]

The Military Justice Act of 1968 established the position of military judge at courts-martial, created independent trial judiciaries within the services, and granted an accused the right to elect a trial by military judge alone, without members.[6] Since 1968, the law and the practice in the military justice system have shifted primary responsibility to military trial judges to preside over all aspects of court-martial procedure.[7]

4. Contemporary Practice

Although military judges have significant authority in presiding over courts-martial, the UCMJ provides no specific statutory role for military judges prior to the referral of charges to a court-martial. Prior to referral, the convening authority makes decisions in certain matters that are then subject to judicial review after charges are referred to a specific court-martial. Examples of legal issues that, under current practice, may require a legal decision prior to referral of charges, include:

- *Inquiries into Mental Capacity or Responsibility*: Under R.C.M. 706 and current practice, an accused's defense counsel typically makes an initial request for a mental health inquiry to the convening authority. If the convening authority denies the request prior to referral, the defense counsel must wait until referral to request that the court order the inquiry. If the military judge at trial concludes that the convening authority erred in denying the request, the trial is abated until the convening authority ensures the inquiry is complete.

- *Depositions*: Article 49 and R.C.M. 702 control deposition practice. Under current law, a convening authority may order depositions after preferral of charges, but a military judge has no power to order a deposition until after charges are referred to a court-martial for trial. After referral, either the convening authority or the military judge may order a deposition.

- *Search Authorizations*: Under M.R.E. 315(d)(1), military commanders have primary authority to authorize probable cause searches conducted in areas over which they have control. There is no UCMJ provision authorizing probable cause searches by military judges or magistrates. M.R.E. 315(d)(2) provides a very limited authority for a military judge or magistrate to authorize a search based on probable cause, but only if authorized by departmental regulations.

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[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *See* MCM 1951, ¶¶39-40.

[6] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[7] *See generally* Fansu Ku, *From the Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009).

- *Pretrial Confinement Reviews*: R.C.M. 305 sets forth the procedural requirements for holding a servicemember in pretrial confinement. The rule includes a review of the probable cause determination and the necessity of continued confinement within seven days of the imposition of confinement by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned." A servicemember is unable to challenge the appropriateness of the pretrial confinement decision or continued confinement before a military judge until a convening authority refers charges, which can occur up to several months after the imposition of pretrial confinement. If the convening authority never refers charges, but instead dismisses the charges after the accused has spent a significant period of time in pretrial confinement, the servicemember has no review of the pretrial confinement decision before a judicial authority. Each service implements R.C.M. 305 in a slightly different manner, based on service regulations.

- *Individual Military Counsel*: Under Article 38(b)(3)(B), an accused has the right to request representation by a specific military counsel if that counsel is reasonably available. The request is submitted through counsel to the convening authority for decision under R.C.M. 506 and service regulations. Prior to referral, the decision is subject to further administrative review, but judicial review is not available until the case is referred for trial. After referral of charges, an accused may file a motion under R.C.M. 905(b)(6) objecting to denial of the request. If the military judge at trial determines that the convening authority erred in denying the request, the trial may be delayed for a lengthy period of time pending the detail of counsel and an opportunity for counsel to prepare for trial. Prior to referral of charges, an accused may not raise such a motion before a military judge.

- *Subpoenas:* The issuance of subpoenas is authorized under Articles 46 and 47 and R.C.M. 703. Under current law, the trial counsel is authorized to issue subpoenas for witnesses and for the production of evidence at any time after charges have been referred to court-martial for trial, and before referral of charges in connection with an Article 32 preliminary hearing. Under R.C.M. 703(e)(2)(F), a military judge only becomes involved in the issuance and enforcement of subpoenas when, after referral of charges to court-martial, "a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive."[8] At that point, the military judge may direct that the subpoena be modified or withdrawn, as appropriate, or may issue a warrant of attachment to compel the attendance of the witness or the production of documents.[9]

[8] This Report proposes amendments to Articles 46 and 47 that would allow military judges to exercise this review authority before referral of charges in the case of subpoenas for the production of evidence (subpoenas duces tecum). Further, the proposed amendments would authorize military judges to issue warrants before referral of charges for the production of stored electronic communications under Chapter 121 of Title 18, United States Code.

[9] R.C.M. 703(e)(2)(G)(i). *See generally* United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts, as opposed to courts-martial, which are temporary tribunals convened to consider specific cases.[10] After a federal defendant makes an initial appearance under Fed. R. Crim. P. 5, the defendant may file motions with a district court judge on issues that must be addressed prior to arraignment or trial.[11] Pretrial issues for judicial determination may include various motions brought on specific grounds or under the All Writs Act.[12]

The Federal Magistrates Act of 1968 established the magistrate judge system for the federal civilian courts.[13] A federal magistrate judge's jurisdiction and powers are set forth by statute.[14] The local rules in each district outline the specific duties magistrate judges are assigned, and they may act on authority expressly granted by federal district court judges or by consent of the parties.[15]

A magistrate judge's duties vary considerably depending on local rules. In criminal cases, magistrate judges have full authority to preside over trials involving petty offenses and in Class A misdemeanor cases by consent of the parties. Magistrate judges assist in felony preliminary proceedings (search and arrest warrants, summonses, initial appearances, preliminary examinations, arraignments, and detention hearings) and in felony pretrial matters (pretrial motions, evidentiary hearings, probation/supervised release hearings, and guilty plea proceedings). When a federal criminal defendant is placed in pretrial confinement, the defendant has the right to a detention hearing during his initial appearance before a magistrate judge.[16] This hearing determines whether continued

[10] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

[11] *See* FED. R. CRIM. P. 12(b) (Pretrial Motions).

[12] 28 U.S.C. § 1651(a). A federal district court may entertain numerous types of pretrial motions, including a motion to quash a grand jury or trial subpoena under FED. R. CRIM. P. 17(c)(2), and a motion for a mental examination of a defendant under 18 U.S.C. §§ 4241, 4142 and FED. R. CRIM. P. 12.2. According to FED. R. CRIM. P. 12(b)(3), some motions must be raised before trial, including a motion alleging a defect in instituting the prosecution, a motion alleging defects in the indictment or information, a motion to suppress evidence, and a motion to sever charges or defendants. Other pretrial motions include a motion for depositions (FED. R. CRIM. P. 15), a motion to quash or modify a subpoena (FED. R. CRIM. P. 17), a motion to dismiss an indictment based on lack of legal qualification of a grand jury or juror (FED. R. CRIM. P. 6(b)(2)), a motion to produce a witness statement (FED. R. CRIM. P. 26.2), and a request to issue a search and seizure warrant (FED. R. CRIM. P. 41).

[13] Pub. L. No. 90-578, Oct. 17, 1968, 82 Stat. 1107. The 1968 Act was preceded by a system of appointed "discreet persons learned in the law" who were authorized by Congress in 1793 to be available to set bail for defendants in federal criminal cases.

[14] 28 U.S.C. § 636.

[15] 28 U.S.C. § 636(b)-(c).

[16] 18 U.S.C. § 3142

confinement of the defendant before trial is warranted. Either party may seek an immediate de novo review of a detention order before a federal district court judge.[17] A magistrate judge may administer oaths and issue orders pertaining to the setting of bail or detention without authorization from a district judge.[18]

6. Recommendations and Justification

Recommendation 30a: Enact a new Article 30a to provide statutory authority for military judges or magistrates to provide timely review, prior to referral of charges, of certain matters currently subject to judicial review only on a delayed basis at trial.

- Under this proposal, the President would designate in the Manual for Courts-Martial the matters subject to pre-referral judicial review. The President also would set forth the procedures for conducting such review, the specific limitations on the remedies available in such cases, and rules regarding further review of such rulings. As a general matter, the remedies available in pre-referral proceedings would be structured in a manner that would preserve the option for the convening authority to defer action until a decision is made to refer the case to trial by court-martial.

- This change would not relieve commanders from the pretrial responsibilities assigned to them under current law, but would provide for earlier rulings on matters currently subject to later review in courts-martial.

- The opportunity for an earlier ruling by a military judge, including the opportunity for timely corrections prior to referral, would enhance the efficiency of the court-martial process by reducing the number of delays that now result from precluding judicial review until referral of charges. Part II of the Report will propose rules governing the types of matters to be considered by military judges and magistrates, such as motions on requests for individual military counsel, mental competency examinations, depositions, the issuance of subpoenas, and ensuring that the protections afforded to victims under the Military Rules of Evidence are properly enforced in preliminary hearings.

- Allowing for judicial determinations of such matters prior to referral would promote efficiency and also would provide relevant information to the convening authority for consideration in the referral and disposition decision-making process.

- Under this proposal and the related proposals under Articles 19 and 26a, military magistrates would function much like military judges but without the entire scope of responsibilities of a military judge due to their lesser experience and rank. These magistrates would augment the military judiciary and serve to relieve the resource burden on military judges to address myriad pretrial matters. In addition, these duties would serve as a training ground to prepare a military magistrate for

[17] United States v. Leon, 766 F.2d 77, 80 (2nd Cir. 1985)

[18] 28 U.S.C. § 636(a).

certification as a military judge and allow for an assessment as to whether such a certification would be appropriate. The services would have discretion as to whether to employ a magistrate program, consistent with general unified standards as supplemented by their own service specific regulations. Certification and detailing of magistrates would rest with the Judge Advocates General or their designees.

7. Relationship to Objectives and Related Provisions

- This proposal to create an Article 30a supports the Terms of Reference by incorporating positive aspects of the federal civilian judicial system into the current military justice structure.
- The proposal is related to Article 26, which addresses detailing military judges to referred court-martial cases, and to the proposal to create Article 26a, which would provide qualification requirements for military magistrates similar to those applicable to military judges.
- The proposal to create an Article 30a also is related to proposed changes to Articles 16 and 19, which would provide for referral to a judge-alone special court-martial, with an option for a military magistrate to preside in such trials with the consent of the parties.
- This proposal is consistent with the proposed amendments to Articles 46 and 47 authorizing military judges to issue and review pre-referral subpoenas and warrants.
- This proposal is consistent with the recommendation contained in the Report of The Response Systems to Adult Sexual Assault Crimes Panel, which stated: "It is the sense of the Panel that military judges should be involved in the military justice process at an earlier stage to better protect the rights of victims and the accused."[19]

8. Legislative Proposal

SEC. 602. PROCEEDINGS CONDUCTED BEFORE REFERRAL.

Subchapter VI of chapter 47 of title 10, United States Code, is amended by inserting after section 830 (article 30 of the Uniform Code of Military Justice) the following new section (article):

[19] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49-50 (June 2014) (Recommendation 118).

"§830a. Art. 30a. Proceedings conducted before referral

"(a) IN GENERAL.—(1) The President shall prescribe regulations for proceedings conducted before referral of charges and specifications to court-martial for trial.

"(2) The regulations prescribed under paragraph (1) shall—

"(A) set forth the matters that a military judge may rule upon in such proceedings;

"(B) include procedures for the review of such rulings;

"(C) include appropriate limitations to ensure that proceedings under this section extend only to matters that would be subject to consideration by a military judge in a general or special court-martial; and

"(D) provide such limitations on the relief that may be ordered under this section as the President considers appropriate.

"(3) If any matter in a proceeding under paragraph (1) becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter shall be transferred to the military judge detailed to the court-martial.

"(b) DETAIL OF MILITARY JUDGE.—The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed to proceedings under subsection (a)(1).

"(c) DISCRETION TO DESIGNATE MAGISTRATE TO PRESIDE.—In accordance with regulations prescribed by the Secretary concerned, a military judge detailed to a proceeding under subsection (a)(1) may designate a military magistrate to preside over the proceeding.".

9. Sectional Analysis

Section 602 would create a new section, Article 30a, to authorize military judges to preside over certain pretrial issues that arise prior to referral of charges in a case. The authority under this section would extend only to issues: (1) that would be subject to post-referral review by a military judge at a general or special court-martial; and (2) that are designated expressly by the President as eligible for pre-referral review under this section. To the extent identified by the President in implementing regulations, judicial proceedings under this section could include matters currently reviewed in post-referral proceedings, such as search authorizations; requests for mental competency evaluations, individual military counsel, depositions, and subpoenas; review of pretrial confinement determinations; and enforcing victims' rights in pretrial proceedings under Article 6b. The rules prescribed by the President would set forth the procedures military judges should use under this section, and would limit the available remedies to those expressly identified by the President. Any pre-referral judicial consideration of these select issues would occur after an appropriate authority had the opportunity to take action to resolve them.

Article 30a(c) would allow the detailed military judge to designate a military magistrate to preside over the proceeding. The statute would provide for the creation of regulations by which military judges could formally review a military magistrate's rulings on pretrial matters. In addition to acting on pretrial matters, military magistrates also could preside over special court-martial cases referred as judge-alone trials, as proposed in Article 19, with the parties' consent. *See* Section 403, *supra.*

Article 31 – Compulsory Self-Incrimination Prohibited
10 U.S.C. § 831

1. Summary of Proposal

This Report recommends no change to Article 31. Part II of the Report will consider whether changes to the rules implementing Article 31 are needed.

2. Summary of the Current Statute

Article 31 codifies the Fifth Amendment's privilege against self-incrimination and common law rules concerning involuntary confessions, providing additional statutory protections against coercive interrogations and degrading questions in the military setting. The article contains four subsections. Subsection (a) provides the general privilege: that persons subject to the Code may not compel any person to incriminate himself or to answer any question that might tend to incriminate them. Subsection (b) operationalizes the privilege by prohibiting any person subject to the Code from interrogating or requesting any statement from an accused, or from any other person suspected of an offense, without first advising them of the nature of the accusation, of their right not to make any statement regarding the suspected offense, and that any statement they make may be used against them in a trial by court-martial. Subsection (c) provides an added protection for witnesses before military tribunals, by prohibiting persons subject to the Code from compelling witnesses to make non-material statements, or to produce non-material evidence, that may tend to degrade them. Subsection (d) is the enforcement mechanism for this section and provides that statements obtained in violation of Article 31, "or through the use of coercion, unlawful influence, or unlawful inducement," may not be used as evidence against the person so questioned in trials by court-martial.

3. Historical Background

The law of confessions and self-incrimination in the military setting has changed significantly since the Articles of War were originally adopted in 1775.[1] The 1776 Articles of War explicitly authorized compulsory testimony, declaring that "[a]ll persons called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court-martial."[2] By 1916, the law against self-incrimination had evolved, and the Articles of War provided a statutory protection against self-incrimination in the context of military court proceedings:

[1] *See generally* CPT Manuel E. F. Supervielle, *Article 31(b): Who Should be Required to Give Warnings?*, 123 MIL. L. REV. 151 (1989).

[2] AW, § XIV, art. 6, of 1776.

> No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.[3]

The 1917 Manual for Courts-Martial clarified the Fifth Amendment's applicability to servicemembers, stating that the Fifth Amendment privilege against self-incrimination "applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness."[4] In 1948, Congress added an additional statutory protection, providing for exclusion of coerced statements and a duty to warn all persons accused of offenses of the right not to make a statement and that any statement made could be used as evidence at a court-martial.[5]

When Congress enacted the UCMJ in 1950, it significantly expanded the protections against self-incrimination in Article 31.[6] The newly enacted statute protected all persons in all situations, not just witnesses during official proceedings.[7] In Article 31(b), Congress extended the warning requirement to any "person suspected of an offense" and added a required warning concerning the nature of the accusation. Finally, under Article 31(d), any statement obtained in violation of the article was now excluded as evidence, regardless of whether or not the statements were "coerced."

In addition to the requirements of Article 31, self-incrimination issues in the military justice system are litigated in light of the requirements of the Fifth Amendment.[8] Given the critical role of confessions and admissions in both civilian and military proceedings, a well-developed and evolving body of case law exists in connection with Article 31 and the related constitutional and regulatory provisions.[9]

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[3] AW 24 of 1916. Prior to 1916, aspects of the right against self-incrimination existed in law and practice. For example, in 1878, Congress made it clear that a military accused did not have to take the stand, and no comment could be made about an accused's failure to do so. *See* Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 54 (1976) (citing the Act of March 16, 1878, ch. 37, 20 Stat. 30). By 1901, Congress included the proviso that "no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him." Act of March 2, 1901, ch. 809, § 1, 31 Stat. 951.

[4] MCM 1917, ¶233.

[5] AW 24 of 1948; Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627.

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[7] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 984-88 (1949).

[8] *See* United States v. Tempia, 37 C.M.R. 249, 260 (C.M.A. 1967) (holding that Miranda v. Arizona, 384 U.S. 436 (1966) applies in military prosecutions).

[9] *See generally* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 5-4(B)(1) (8th ed. 2012).

Article 31 has changed very little since the UCMJ was enacted in 1950. However, the case law concerning the statute's application has evolved over the years—particularly with respect to Article 31(b)'s warning requirements.[10] Some of the key issues addressed by appellate courts include when warnings must be given and who must warn. Not all conversations with a suspect must be preceded by rights warnings.[11] Warnings must be given before any "official" questioning by a person subject to the Code, or questioning by someone acting as an agent for the military, which might include a civilian, a government employee, or a foreign law enforcement officer.[12]

4. Contemporary Practice

The President has implemented Article 31 through Military Rules of Evidence 301 (Privilege concerning compulsory self-incrimination), 303 (Degrading questions), 304 (Confessions and admissions), and 305 (Warnings about rights). These rules create a procedural framework to protect the right of witnesses against self-incrimination, and to provide guidance to courts and practitioners on the application of Article 31's provisions.[13] The rules generally track the case law concerning the Fifth Amendment and Article 31, though some terms used in the rules are left unspecific given the evolving nature of the case law in the area.[14] The rules have not yet been updated to reflect the most recent developments in the case law concerning Article 31(b).

5. Relationship to Federal Civilian Practice

Military practice and federal civilian practice in the areas of self-incrimination, involuntary confessions, and rights warnings share many commonalities, and the Supreme Court's case

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[10] *See generally* Supervielle, *supra* note 1. Consider the evolution in the law from United States v. Duga, 10 M.J. 206, 209 (C.M.A. 1981) (holding that Article 31(b)'s warning requirements applied only if the questioner was acting in an official capacity *and* if the suspect perceived the official nature of the questioning) to United States v. Jones, in which the Court of Appeals for the Armed Forces modified the second prong of the *Duga* test, which had utilized a subjective standard. United States v. Jones, 73 M.J. 357, 361 (C.A.A.F. 2014). Under the *Jones* modified test, Article 31(b) applies to situations in which: (1) the questioner is acting in an official law-enforcement or disciplinary capacity; *or* (2) the questioner "could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."

[11] SCHLUETER, *supra* note 9, at § 5-4(B)(1).

[12] *Id.*; *see also* United States v. Pinson, 56 M.J. 489 (C.A.A.F. 2002) (holding that Icelandic criminal investigators were not acting under the control or direction of Naval investigators when they interrogated appellant); United States v. Ruiz, 54 M.J. 138, 140 n.2 (C.A.A.F. 2000) (noting that the actions of an undercover agent are "not within the scope of the warning requirement in Article 31(b)"); United States v. Smith, 56 M.J. 653 (A. Ct. Crim. App. 2001) (Article 31 warnings not required when questioning accused during unscheduled classification board because such questioning had legitimate administrative purpose and was not for purpose of obtaining information to be used at trial).

[13] *See generally* STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 3-22 – 3-285 (7th ed. 2011).

[14] MCM, App. 22 (M.R.E. 305(c), Analysis).

law in this area is fully applicable to servicemembers.[15] Civilian practice focuses largely upon case law interpreting the Fifth Amendment, although in *Miranda v. Arizona*, the Supreme Court specifically looked to Article 31(b) to craft an exclusionary rule to protect the Fifth Amendment privilege against self-incrimination during civilian police interrogations.[16] In its decision, the Court held that an individual being questioned by law enforcement "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," or else any statement made by the person would be inadmissible against him in a criminal proceeding.[17] Military practice applies Article 31, the Military Rules of Evidence, and the Fifth Amendment. Because both privileges—the Fifth Amendment privilege against self-incrimination and the statutory privilege under Article 31—apply to servicemembers, M.R.E. 301 clarifies that "[t]he privilege most beneficial to the individual asserting the privilege shall be applied" when determining whether to admit an accused's prior statements in a military criminal proceeding.[18]

6. Recommendation and Justification

Recommendation 31: No changes to Article 31.

- The subject of self-incrimination lies at the intersection of constitutional law, statutory articles, and regulatory provisions in an area of intense and ongoing litigation. As such, caution is particularly warranted with respect to statutory changes, lest the attempt to codify existing case law either stifles a subject in which the applicable civilian and military case law is evolving, or in which the introduction of new language would trigger extensive interpretative litigation. The military appellate courts have shown flexibility in adapting Article 31's provisions to changing times and to previously unanticipated factual scenarios. In that context, this Report does not recommend amendments to Article 31.

- Part II of the Report will consider whether any of the regulatory provisions need to be update to ensure consistency with the evolving interpretations of Article 31.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by using the current UCMJ as a baseline for departure. This proposal supports the MJRG's Operational Guidance by not recommending statutory changes in an area where the case law is evolving yet stable, and which would likely lead to additional litigation.

[15] The applicability of the Fifth Amendment to servicemembers was noted in the MCM as early as 1917. *See* MCM 1917, ¶233-36.

[16] Miranda v. Arizona, 384 U.S. 436, 489 (1966).

[17] *Id.* at 444.

[18] M.R.E. 301(a).

Article 32 – Preliminary Hearing
10 U.S.C. § 832

1. Summary of Proposal

This proposal would focus the preliminary hearing on an initial determination of probable cause prior to referring charges to a general court-martial; require a more comprehensive preliminary hearing report; and provide an opportunity for the government, the defense, and victims to submit additional information at the conclusion of the hearing pertinent to an appropriate disposition of the charges and specifications. The proposal would replace the statute's provision for a "recommendation" on disposition with a requirement for the preliminary hearing officer to analyze and organize the information from the proceeding in a manner designed to better assist the staff judge advocate and the convening authority in fulfilling their respective disposition responsibilities under Articles 30 and 34. Part II of the Report will address changes in the rules implementing Article 32 that would be required as a result of the proposed statutory amendments.

2. Summary of the Current Statute

Article 32, as recently amended by NDAA FY 2014 and NDAA FY 2015, requires completion of a preliminary hearing as a precondition to referral of charges to a general court-martial. The statute provides that the purpose of a preliminary hearing is limited to: (1) determining whether there is probable cause to believe the accused committed the offense; (2) determining whether there is jurisdiction over the accused and the offense(s); (3) considering the form of the charge(s); and (4) recommending "the disposition that should be made of the case." An impartial hearing officer, normally a judge advocate senior in rank to the accused, presides at the preliminary hearing and prepares a post-hearing report for the convening authority addressing probable cause, jurisdiction, the form of the charges, and the hearing officer's recommendation as to disposition. At the hearing, the accused, who must be advised of the charges, has the right to be represented by counsel, to cross-examine witnesses who testify, and to present evidence in defense and mitigation that is relevant to the purposes of the hearing. The hearing officer may consider uncharged misconduct, subject to providing notice to the accused and affording the accused the same opportunities for representation, cross-examination, and presentation of evidence as are available regarding the charges.

Article 32(d)(3) provides that a victim (including any military member) who declines to testify at the preliminary hearing cannot be required to do so. Under Article 32(e), the preliminary hearing must be recorded, and a copy of the recording must be provided to a victim upon request. The requirements of Article 32 are binding on all convening authorities; however, failure to follow them does not constitute jurisdictional error.

3. Historical Background

Article 32 traces its history to the 1920 amendments to the Articles of War, which grew out of the post-World War I debates concerning the administration of military justice in the Army during the war.[1] A significant concern raised during the hearings and debates concerned the practice under which "a soldier may be put on trial by a commanding officer's arbitrary discretion, without any preliminary inquiry into the probability of the charge."[2] The 1920 amendments to the Articles of War established a requirement that:

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides . . . .[3]

The goal of this statutory pretrial investigation was to ensure adequate preparation of cases; to guard against hasty, ill-considered charges; to save innocent persons from the stigma of unfounded charges; and to prevent trivial cases from going before general courts-martial.[4]

The post-World War II military justice debates resulted in a series of amendments to the Articles of War known as the Elston Act.[5] Among the changes, Congress moved "pretrial investigations" to Article 46 and amended the statute to permit the accused to be

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[1] AW 70 of 1920. Like the rest of the Articles of War, this requirement applied only to the United States Army. Discipline in the Navy was controlled by the Articles for the Government of the Navy, which contained no statutory provision for a pretrial investigation. The Articles for the Government of the Navy were adopted in 1862 and had not been substantially amended since that time. Coast Guard Disciplinary Regulations called for a "careful investigation into the circumstances on which the complaint is founded" and a written report which included available witnesses and evidence.

[2] WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919). It was also during this time that the Army first developed the criminal investigative division within the Military Police Corps to conduct criminal investigations. However, at this early stage, investigators were selected from military police units within each individual command, and they generally lacked investigative training and experience. The Navy's criminal investigative organization did not develop until 1945, when the Office of Naval Intelligence charter was expanded to include criminal investigations.

[3] AW 70 of 1920.

[4] Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) (citing WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919)).

[5] Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627.

represented by counsel at the investigation.[6] Two years later, Congress consolidated the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Rules for the Coast Guard into the UCMJ and incorporated the requirement for a pretrial investigation.[7] The language of Article 32 outlining its purpose, however, remained essentially the same as under the original statute under the 1920 Articles of War: an inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case "in the interest of justice and discipline."[8]

Subsequent to enactment of the UCMJ, the statutory provisions governing the Article 32 investigation remained largely unchanged over the next six decades, with only minor technical and clarifying amendments. The Military Justice Amendments of 1981 clarified the accused's right to individual military counsel at the investigation and aligned the right to counsel in Article 32(b) with the right to counsel under Article 27 and the duties of counsel contained in Article 38.[9] NDAA FY 1996 amended the statute to provide for the investigation of uncharged misconduct,[10] and NDAA FY 2012 expanded the subpoena authority under Article 47 to include a subpoena to compel the production of documents and evidence issued in connection with an Article 32 investigation.[11]

In NDAA FY 2014, Congress revised Article 32 in its entirety, with the new provisions applying to offenses committed on or after December 27, 2014.[12] The Joint Explanatory Statement accompanying the final bill noted that the legislation "changes Article 32, UCMJ, proceedings from an investigation to a preliminary hearing."[13] The statement drew the

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[6] AW 46(b) of 1948 ("The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command . . . ."). As Congress was enacting the Elston Act, the Navy was conducting a review of the Articles for Government of the Navy. Although these Articles did not require a pretrial investigation, internal Service regulations called for an inquiry by the officer recommending court-martial, who could order a board of investigation or court of inquiry if additional development of the facts was needed. *See* SYNOPSIS OF RECOMMENDATIONS FOR THE IMPROVEMENT OF NAVAL JUSTICE, OFFICE OF THE JUDGE ADVOCATE GENERAL, NAVY DEPARTMENT (1947), *available at* http://www.loc.gov/mwg-internal/de5fs23hu73ds/progress?id=yHs22rx0-_bQk8Zm_NTgo2FGtJbHsUEszdpj8uXPbRo.

[7] Act of May 5, 1950, ch. 169, 64 Stat. 108.

[8] Article 32(a) (1950-2013).

[9] Military Justice Amendments of 1981, Pub. L. No. 97-81, § 4, 95 Stat. 1085.

[10] NDAA FY 1996, Pub. L. No. 105-85, § 1131, 111 Stat. 1759 (1997).

[11] NDAA FY 2012, Pub. L. No. 112-81, § 542, 125 Stat 1298 (2011); *see* R.C.M. 703(e)(2)(c)(1).

[12] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013). NDAA FY 2015 subsequently amended the new Article 32 to apply to all hearings held on or after December 27, 2014, irrespective of the date of the offenses. NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[13] 159 CONG. REC. H7949 (daily ed. Dec. 12, 2013) (Joint Explanatory Statement on H.R. 3304).

following contrast between an Article 32 "investigation" under then-current law and an Article 32 "preliminary hearing" under the new version of Article 32:

> Under current law and Rule 405 of the Rules for Courts-Martial, an Article 32, UCMJ investigation includes an inquiry into the truth of the matters set forth in the charges, provides a means to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, and serves as a tool of discovery. The agreement establishes that an Article 32, UCMJ, preliminary hearing has a narrower objective: (1) Determine whether there is probable cause to believe an offense has been committed and that the accused committed the offense; (2) Determine whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) Consider the form of the charges; and (4) Recommend the disposition that should be made of the case.[14]

Subsequently, Congress approved a technical amendment to the new Article 32 to clarify that the accused, as under prior law, could waive the Article 32 proceeding.[15]

4. Contemporary Practice

The new Article 32 provisions apply to all preliminary hearings held on or after December 27, 2014. A recent executive order contains the implementing rules and procedures for the new Article 32, including a new R.C.M. 404A addressing disclosure of matters to the defense before the preliminary hearing.[16] The substance of the new statute and the new implementing provisions have not been addressed in reported appellate decisions.[17] Part II of this Report will further consider contemporary practice in light of any developments in the implementing rules or the applicable case law concerning Article 32.

5. Relationship to Federal Civilian Practice

There is not a direct corollary to the Article 32 hearing in federal civilian practice. Both the prior Article 32 investigation and the current Article 32 preliminary hearing have been compared to two distinct types of civilian proceedings—a civilian grand jury and a judicial probable cause hearing.[18] The current Article 32 preliminary hearing has some of the traits of both, and possesses other traits common to neither.

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[14] *Id.*

[15] NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[16] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[17] *See* Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938-59,942 (Oct. 3, 2014).

[18] *See, e.g.*, Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. L. REV. 25 (1973); *see also* REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014) (comparing the prior Article 32 investigation and the new Article 32 preliminary hearing to the civilian preliminary hearing, and identifying two major differences: (1) unlike civilian preliminary hearings, Article 32 hearings have traditionally served as a discovery tool for the defense; and (2) unlike

In federal civilian criminal trials, the right to a grand jury is established through the Fifth Amendment to the Constitution and is implemented in the Federal Rules of Criminal Procedure, which recognize the right to grand jury indictment in all felony cases.[19] The Supreme Court has described the purpose and powers of the grand jury in expansive terms:

> [The grand jury] serves the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. It has . . . extraordinary powers of investigation and great responsibility for directing its own efforts. . . . Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.[20]

The U.S. Attorney's Manual, however, describes a narrower role for grand jurors:

> While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. . . . The grand jury's power, although expansive, is limited by its function toward possible return of an indictment . . . [and] cannot be used solely to obtain additional evidence against a defendant who has already been indicted [or] used solely for pre-trial discovery or trial preparation.[21]

Although the grand jury is often described as an independent body—and grand juries do act with independence in many areas—the Supreme Court has stated that it is "an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses."[22] This specifically includes the ability of the grand jury to issue subpoenas. However, the court's ability to exercise its supervisory power over grand juries is limited.[23]

Regular federal grand juries are standing bodies, impaneled for up to eighteen months, although they may actually sit for as little as once a month. Grand juries have a maximum of 23 members, with 16 needed for a quorum. An indictment may be returned by a vote of 12

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civilian preliminary hearings, the Article 32 hearing officer's determination regarding probable cause is not binding on the convening authority).

[19] FED. R. CRIM. P. 7(a).

[20] United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983) (internal quotations and citations omitted).

[21] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.101 (1997) [hereinafter USAM].

[22] Brown v. United States, 359 U.S. 41, 49 (1959).

[23] *See* United States. v. Williams, 504 U.S. 36 (1992) ("Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.").

or more members.[24] The grand jury does not conduct its business in open court, and a federal judge does not preside over its proceedings. It meets behind closed doors, in secret, with only the grand jurors, the attorney for the government, witnesses, a recorder, and possibly an interpreter present. The target of a grand jury investigation or a potential defendant may request to appear and testify before the grand jury, but may actually appear only if invited or subpoenaed and may not be accompanied by counsel while testifying. In addition, a potential defendant has no right to cross-examine witnesses and no right to introduce evidence in rebuttal. Hearsay evidence is generally permissible at the grand jury proceeding, and there is no legal requirement for the prosecutor to present exculpatory evidence.[25]

There are four possible outcomes from a federal grand jury investigation: (1) an indictment, in which the grand jury accuses an individual investigated of a specific crime and the government is authorized to proceed to trial; (2) a vote not to indict, which is binding on the government unless the U.S. Attorney specifically authorizes the case to be re-presented to the same or a different grand jury; (3) the discharge or expiration of the grand jury without any action; or (4) the submission of a presentment or report to the court.[26] In the majority of cases that go before a grand jury, the government will have already conducted a criminal investigation, and is primarily seeking an indictment. In these cases, the attorney for the government will present evidence to the grand jury, including testimony from criminal investigators or law enforcement agents, in order to establish probable cause for the indictment. In other cases, however, the investigation will be incomplete before the grand jury stage, and the grand jury—either on its own initiative or at the suggestion of the attorney for the government—will investigate the matter presented by the government. In its investigative capacity, the grand jury has the power to issue subpoenas to compel the testimony of witnesses and the production of documents

[24] FED. R. CRIM. P. 6(a) and (f).

[25] *See Williams*, 504 U.S. at 55 ("[W]e conclude that courts have no authority to prescribe such a duty [to disclose exculpatory evidence to the grand jury] pursuant to their inherent supervisory authority over their own proceedings."). Although there is not a legal requirement, Department of Justice policy requires a prosecutor who is personally aware of substantial evidence that directly negates the guilt of a subject to disclose that evidence to the grand jury before seeking an indictment. USAM, *supra* note 21, at § 9-11.241. *Cf.* R.C.M. 601(d)(1) (providing that charges may be referred to court-martial by a convening authority "based on hearsay in whole or in part" and that "[t]he convening authority or judge advocate may consider information from any source . . . ."); R.C.M. 701(a)(6) (requiring the trial counsel to disclose to the defense "as soon as practicable" evidence known to the trial counsel that reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt, or reduce the punishment).

[26] *See generally* SUSAN W. BRENNER, GREGORY C. LOCKHART & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE, 1 FED. GRAND JURY § 3:4 (2d ed., 2006). At common law, 'indictments' were returned based upon evidence presented to the grand jury, while 'presentments' were "the notice taken by the grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them. . . ." Presentments are no longer a common practice.

and physical evidence.[27] A grand jury uses the court's subpoena power, as provided in Fed. R. Crim. P. 17.

In addition to the grand jury, federal civilian practice also provides for an adversarial preliminary hearing, to be conducted between 14-21 days following a not-yet-indicted accused's initial appearance following arrest.[28] The hearing is presided over by a federal magistrate judge, whose role is to determine whether there is probable cause for the charges. If there is probable cause, the magistrate judge "binds over" the charges for felony trial (pending indictment) in U.S. district court; if there is not probable cause, the magistrate judge dismisses the complaint.[29] The purpose of this proceeding is to provide the accused a procedural protection against baseless charges early in the life of a case in situations where the government has not yet sought or obtained a grand jury indictment.[30]

With respect to state practice, the Constitutional guarantee of prosecution by grand jury indictment is not applicable to the states,[31] and the Supreme Court has held that independent judicial screening of felony-level charges through a preliminary hearing is not a due process requirement.[32] Nevertheless, all American jurisdictions provide at least one procedural avenue for obtaining such a screening, and nearly two-thirds of the states allow for filing of felony-level charges without a prior grand jury indictment.[33] Instead, most of these states allow felony cases to be brought following an adversarial preliminary hearing similar to the one provided for by Fed. R. Crim. P. 5.1. Six of these states permit bypassing the preliminary hearing through direct filing of an information (a charging instrument filed with the court similar in both content and function to charges that are referred to a court-martial).[34] In these direct filing jurisdictions, the trial judge makes an ex parte probable

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[27] *Cf.* R.C.M. 703(e)-(f), as amended by Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 18, 2014) (providing trial counsel and the Article 32 investigating officer with the power to issue subpoena duces tecum prior to referral of charges to court-martial in support of the investigation).

[28] FED. R. CRIM. P. 5.1(c). The rule requires the preliminary hearing to take place within 14 days of the initial appearance only when the accused is in custody.

[29] FED. R. CRIM. P. 5.1(e)-(f); *see* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE §14.1(a) (Screening) (3d ed. 2013).

[30] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Functions of the preliminary hearing) (3d ed. 2013) ("Preliminary hearing screening is said to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to ensure that there are substantial grounds upon which a prosecution may be based."). Under FED. R. CRIM. P. 5.1(a)(2), the government can bypass the preliminary hearing requirement by securing a prior grand jury indictment.

[31] Hurtado v. California, 110 U.S. 516 (1884).

[32] Lem Woon v. Oregon, 229 U.S. 586 (1913).

[33] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Indictment states) and § 14.2(d) (Information states).

[34] *Id*. The "direct filing" states include Florida, Iowa, Montana, Minnesota, Vermont, and Washington. Of these states, Minnesota and Vermont have eliminated the preliminary hearing entirely. *Id.*

cause determination after the filing of the information by the prosecutor, by reviewing the charges and the prosecutor's sworn affidavit summarizing the available evidence.[35]

Like Article 32 hearings, state-level preliminary hearings are generally adversarial in nature. The accused has a right to counsel and to cross-examine witnesses; though in the majority of jurisdictions the rules of evidence do not apply, except with respect to privileges.[36] Most jurisdictions recognize a general defense right to present defense witnesses at the preliminary hearing.[37] However, "[w]here the magistrate has reason to believe that the defense is calling a witness to obtain further discovery of the prosecution's case, the magistrate may require the defense to make an offer of proof as to what will be obtained from the witness' testimony."[38] Furthermore, in most jurisdictions, magistrate judges will not allow subpoenas of crime victims to testify at the preliminary hearing, or at any pretrial proceeding, unless it can be shown that they are likely to be unavailable to testify at trial.[39]

The primary purposes of preliminary hearings in both federal and state practice—similar to the primary purposes of Article 32 and its statutory predecessors in the Articles of War—are to prevent hasty, malicious, improvident, or oppressive prosecutions; to ensure that there are substantial grounds upon which a prosecution may be based; and to avoid the unnecessary public expense of an unwarranted trial.[40] To ensure these purposes are fulfilled, the magistrate judge's probable cause determination is generally binding on the government.[41] Preliminary hearings also serve several prosecution and public policy goals, including: helping to inform the decision by the government whether to proceed with criminal prosecution at the felony trial court; informing the ultimate decision by the

[35] *Id.*; *see, e.g.*, MINN. R. CRIM. P. 2.01.

[36] LAFAVE ET AL., *supra* note 29, at § 14.4 (Preliminary hearing procedures). The right to cross-examine witnesses at a preliminary hearing is based on local law only, as the Supreme Court has long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment. *See* Goldsby v. United States, 160 U.S. 70 (1895).

[37] LAFAVE ET AL., *supra* note 29, at § 14.4(d).

[38] *Id.*

[39] *Id.*; *see also id.* at § 20.2(e) (Depositions) (explaining that in the vast majority of jurisdictions, so-called "discovery depositions" are not allowed).

[40] *Id.* at § 14.1(a). *Cf.* Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) ("[The pretrial investigation's] original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial.") (referring to AW 70 of 1920, the predecessor to Article 32 of the UCMJ).

[41] LAFAVE ET AL., *supra* note 29, at § 14.3. In most jurisdictions, the consequence of the magistrate judge not finding probable cause is a dismissal without prejudice, with the ability for the prosecution to seek a new preliminary hearing with new evidence, or even with the same evidence. *Id.* at § 14.3(c). A minority group of states, however, prohibit refiling on the same evidence and provide for prosecution appeal of a dismissal to the trial court. *Id.*

accused with respect to his plea;[42] gaining the defense perspective as to what actually happened; promoting the victim's interest in pursuing the matter by presenting it in a public forum; and promoting public confidence in a sensitive prosecutorial decision by having the evidence presented in a public forum and the decision ratified by a neutral and detached magistrate (or, if the case is likely to be dismissed, by showing that the dismissal stemmed from deficiencies in the evidence rather than any favoritism on the part of the prosecutor).[43] For these reasons, in most states where there is an option to bypass the preliminary hearing with a grand jury indictment, prosecutors generally choose not to exercise this option.[44]

The recently enacted Article 32 preliminary hearing differs from its federal and state civilian counterpart in that the preliminary hearing officer does not exercise judicial powers with respect to the disposition of charges. Instead, the preliminary hearing and the report of the preliminary hearing officer serve primarily as vehicles for developing and analyzing information for consideration by the staff judge advocate and the convening authority. The responsibility for determining probable cause and jurisdiction, as well as the responsibility for making a decision on disposition, only arise after the preliminary hearing officer prepares and forwards the report required by Article 32. At that point, before the charges and specifications may be referred to a general court-martial for trial, the staff judge advocate makes a determination on the legal issues of probable cause, jurisdiction, and whether each specification states an offense under military law which is binding on the convening authority if any of the three are lacking. As a separate matter, the staff judge advocate makes an advisory recommendation on disposition to the convening authority, the officer charged with the responsibility for making the ultimate disposition decision.

6. Recommendation and Justification

Recommendation 32: Amend Article 32(a)-(c) by revising the current requirement for a disposition "recommendation" to focus the preliminary hearing officer more directly on providing an analysis of the information that will be useful in fulfilling the statutory responsibilities of: (1) the staff judge advocate, in providing legal determinations and a disposition recommendation to the convening authority under Article 34; and (2) the convening authority, in disposing of the charges and specifications "in the interest of justice and discipline" under Article 30.

- This proposal would retain the core purposes of the Article 32 preliminary hearing as amended—to determine whether or not each specification alleges an offense, whether or not there is probable cause to believe that the accused committed the

[42] *Id.* at § 14.1(e) ("The hearing may then provide a valuable 'educational process' for the defendant who is not persuaded by his counsel's opinion that the prosecution has such a strong case that a negotiated plea is in the defendant's best interest.").

[43] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS 1015 (13th ed. 2012).

[44] *See id.* at § 14.2(d), noting that the bypass option is utilized in many state jurisdictions in less than ten percent of felony cases. This is different from the federal practice, where federal prosecutors routinely bypass scheduled preliminary hearings by obtaining prior indictments. *See id.* at § 14.2(b).

offense charged, and whether or not the convening authority has jurisdiction over the accused and the offense—while restructuring the current requirement for a disposition recommendation. As amended, the parties and any victim of an offense could submit additional matters relevant to disposition to the hearing officer, which the hearing officer would then organize and analyze in the preliminary hearing report. As such, the proposed amendments would retain the current limitations on the nature of the Article 32 preliminary hearing, while expanding the opportunity for victims and the accused to provide timely and useful input for consideration in the disposition decision-making process.

- The proposed amendments recognize that the preliminary hearing officer is in a unique position to organize and analyze the information developed during the preliminary hearing and—as will be developed more fully in the proposed implementing rules in Part II of this Report—a broader range of additional documentary information that the government, the accused, and the victim would be able to submit following the hearing. Under the proposed amendments, the hearing officer would use all of this information to assist and inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision.

- Under the proposal, the hearing officer's report would be required to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; whether any modifications to the specifications are needed; the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; observations concerning the testimony of witnesses; additional information relevant to the convening authority's disposition decision under Articles 30 and 34; and a discussion of any uncharged offenses.

- The proposed amendments would emphasize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

- As in the current statute, the proposal reflects that none of the preliminary hearing officer's conclusions would be binding on the convening authority, who is ultimately responsible for determining the appropriate disposition of the charges and specifications for each case in the interest of justice and discipline.

- This proposal reaffirms that a victim's desire not to testify at the preliminary hearing will not, alone, be grounds for ordering a deposition.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by incorporating, to the extent practicable and appropriate, the principles of law and the rules of procedure used in the trial of criminal cases in the United States district courts into military justice practice.
- This recommendation also supports the GC Terms of Reference by examining and incorporating where appropriate the recommendations, proposals and analysis of the Response Systems Panel—in particular, Recommendation 115 (concerning the ordering of depositions), Recommendation 116 (regarding the treatment of the hearing officer's recommendation), and Recommendation 55 (regarding creation and implementation of mechanisms requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority regarding case disposition) of the Response Systems Panel's final report.
- This recommendation is related to the proposed amendments to Articles 30, 33 and 34 concerning the staff judge advocate's responsibility to provide a recommendation, the convening authority's responsibility to appropriately dispose of the case, and guidance concerning the exercise of disposition authority.

8. Legislative Proposal

SEC. 603. PRELIMINARY HEARING REQUIRED BEFORE REFERRAL TO GENERAL COURT-MARTIAL.

(a) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended by striking the section heading and subsections (a), (b), and (c), and inserting the following:

"§832. Art. 32. Preliminary hearing required before referral to general court-martial

"(a) IN GENERAL.—(1)(A) Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an

impartial hearing officer, detailed by the convening authority in accordance with subsection (b).

"(B) Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required.

"(2) The issues for determination at a preliminary hearing are limited to the following:

"(A) Whether or not the specification alleges an offense under this chapter.

"(B) Whether or not there is probable cause to believe that the accused committed the offense charged.

"(C) Whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

"(b) HEARING OFFICER.—(1) A preliminary hearing under this section shall be conducted by an impartial hearing officer, who—

"(A) whenever practicable, shall be a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)); or

"(B) in exceptional circumstances, shall be an impartial hearing officer, who is not a judge advocate so certified.

"(2) In the case of a hearing officer under paragraph (1)(B), a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)) shall be available to provide legal advice to the hearing officer.

"(3) Whenever practicable, the hearing officer shall be equal in grade or senior in grade to military counsel who are detailed to represent the accused or the Government at the preliminary hearing.

"(c) REPORT TO CONVENING AUTHORITY.—After a preliminary hearing under this section, the hearing officer shall submit to the convening authority a written report (accompanied by a recording of the preliminary hearing under subsection (e)) that includes the following:

"(1) For each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (a)(2), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.

"(2) Recommendations for any necessary modifications to the form of the charges or specifications.

"(3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense, that, under such rules as

the President may prescribe, is relevant to disposition under sections 830 and 834 of this title (articles 30 and 34).

"(4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (f).".

(b) SUNDRY AMENDMENTS.—Subsection (d) of such section (article) is amended—

(1) in paragraph (1), by striking "subsection (a)" in the first sentence and inserting "this section";

(2) in paragraph (2), by striking "in defense" and all that follows through the end and inserting "that is relevant to the issues for determination under subsection (a)(2).";

(3) in paragraph (3), by adding at the end the following new sentence: "A declination under this paragraph shall not serve as the sole basis for ordering a deposition under section 849 of this title (article 49)."; and

(4) in paragraph (4), by striking "the limited purposes of the hearing, as provided in subsection (a)(2)." and inserting the following: "determinations under subsection (a)(2).".

(c) REFERENCE TO MCM.—Subsection (e) of such section (article) is amended by striking "as prescribed by the Manual for Courts-Martial" in the second sentence and inserting "under such rules as the President may prescribe".

(d) EFFECT OF VIOLATION.—Subsection (g) of such section (article) is amended by adding at the end the following new sentence: "A defect in a report under subsection (c) is not a basis for relief if the report is in substantial compliance with that subsection.".

9. Sectional Analysis

Section 603 would amend Article 32 to clarify current law concerning the requirement for and the conduct of preliminary hearings before referral of charges and specifications to general courts-martial for trial. The amendments would focus the preliminary hearing on an initial determination of probable cause, jurisdiction, and the form of the charges, and would provide for the production of evidence and the examination of witnesses to assist the preliminary hearing officer in making these determinations. In addition, the amendments would revise the requirement for a disposition recommendation—currently provided as a fourth, distinct purpose of the preliminary hearing—to focus the preliminary hearing officer more directly on providing a thorough analysis of the information developed at the hearing. The purpose of this analysis would be to inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision with respect to the charges and specifications in the case, rather than providing a disposition recommendation in summary form without supporting analysis. The report and the analysis contained within it would be advisory in nature and would be designed to assist the staff judge advocate and the convening authority. The analysis contained within the report would not provide a basis for complaint or relief when in substantial compliance with the requirements of the amended Article 32. As amended, Article 32 would contain the following provisions:

Article 32(a) would state the issues for determination at the preliminary hearing: (1) whether or not the specification alleges an offense under the UCMJ; (2) whether or not there is probable cause to believe that the accused committed the offense charged; and (3) whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

Article 32(b) would retain and clarify current law concerning the qualifications of the preliminary hearing officer.

Article 32(c) would require the preliminary hearing officer's report to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; any necessary modifications to the form of the charges and specifications; the state of the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; a statement regarding the availability and admissibility of evidence; additional information relevant to disposition of

charges and specification under Articles 30 and 34; and a discussion of any uncharged offenses. The proposed amendments recognize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

Article 32(c)(2) would provide the parties and any victim with the opportunity to submit additional information to the preliminary hearing officer for transmission for consideration by the convening authority with respect to disposition. The procedure for submission of additional information would be separate from the hearing, reflecting the broader range of information that may be pertinent to the exercise of disposition discretion. The implementing regulations would provide procedures for sealing or otherwise protecting sensitive or personal material in the additional information submitted by the parties or the victim.

Article 32(d)(3) would clarify that a victim's declination to participate in the Article 32 hearing "shall not serve as the sole basis for ordering a deposition" under Article 49. This change would ensure that a victim's declination under Article 32(d)(3) is not used to circumvent the limited purpose of depositions under Article 49: to preserve prospective witness testimony for use at trial, generally in cases where the prospective witness will be unavailable to testify in person. *See* Section 711, *infra.*

The proposed changes are based in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline—of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing—including those factors contained in the disposition guidance under the proposed new Article 33. In addition, consistent with the proposed amendments to Articles 46 and 47 (and as will be more fully developed in the Rules for Courts-Martial), the authority to issue pre-referral investigative subpoenas would be governed by a uniform policy that will apply throughout the process prior to referral, and would not be limited narrowly to Article 32 proceedings.

Article 33 (Current law) – Forwarding of Charges
10 U.S.C. § 833

1. Summary of Proposal

This proposal would move the requirement for prompt forwarding of charges in cases involving pretrial confinement or arrest from Article 33 to Article 10.

2. Summary of the Current Statute

Article 33 requires that the commanding officer forward the charges against "a person who is held for trial by general court-martial," along with the Article 32 preliminary hearing report, to the officer exercising general court-martial jurisdiction within eight days after the accused is ordered into arrest or confinement "if practicable." When such forwarding is not practicable, the article requires the commanding officer to submit a written report to the general court-martial convening authority stating the reasons for delay.

3. Historical Background

Article 33 is based on a similar provision from Article 46c of the 1948 Articles of War:

> When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges.[1]

This provision was derived, in turn, from Articles 70 and 71 of the 1920 Articles of War. Article 70 provided that "no officer or soldier" could be held in pretrial confinement for "more than eight days, or until such time as a court-martial can be assembled."[2] Article 71 required that "an officer" held in pretrial confinement be served with a copy of the charges within eight days of his confinement.[3] Article 71 also required that the officer be brought to trial with 10 days of the service of such charges.[4] Neither of the Article 71 requirements, apparently, applied to enlisted members who were ordered into confinement. Whereas Article 10 requires prompt disposition of offenses in all cases in which the accused is being held for trial, the drafters of the UCMJ specifically intended Article 33 to insure "an

[1] AW 46c of 1948; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1005 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] AW 70 of 1920.

[3] AW 71 of 1920.

[4] *Id.* The article, however, allowed an additional 30 days to bring an officer to trial based on the "necessities of service."

expeditious processing of charges and specifications in general courts-martial," where there was an additional pretrial requirement of the Article 32 investigation.[5] Unlike its predecessors, Article 33 requires the report of the investigating officer (now the preliminary hearing officer) to be forwarded along with the charges. The drafters acknowledged, however, that the 8-day requirement for forwarding was "just an arbitrary figure."[6] Otherwise, there was very little discussion of Article 33 during the Congressional hearings leading to the enactment of the UCMJ in 1950.

4. Contemporary Practice

The President has not implemented Article 33's 8-day requirement for the forwarding of charges to the general court-martial convening authority when a member is held in pretrial confinement anywhere in the Rules for Courts-Martial. Because it is rare in modern practice for an Article 32 hearing and report to be completed within eight days, it has not served as a realistic time frame for moving cases forward. However, the reporting requirement in Article 33 is typically performed as matter of routine in accordance with service-specific reporting regulations whenever an accused is placed in placed in pretrial confinement. Notwithstanding the statute's unrealistic time frame for forwarding charges, the courts have viewed Article 33 as serving two primary purposes independent of its specific requirements. First, the courts have held that Article 33 is a source of "speedy trial law" in the military justice system.[7] Second, the article has, historically, served to ensure early assignment of defense counsel to military members in pretrial confinement.[8] Within the Manual for Courts-Martial, there are seven provisions which require that an action be taken "as soon as practicable."[9] Among these provisions, only Article 33 also includes a time certain.

5. Relationship to Federal Civilian Practice

There is no direct federal civilian analogue for Article 33. Instead, the interests underlying Fed. R. Crim. P. 5 (Initial Appearance) and the Speedy Trial Act, 18 U.S.C. § 3161, are spread among the requirements contained in Articles 10, 30, 33, and 35, along with the rules implementing these statutes.

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[5] S. REP. NO. 486, at 17 (1949); *see also Hearings on H.R. 2498*, *supra* note 1, at 908 (discussing the relationship between Articles 10, 33, and 98 in the context of the accused's right to a speedy trial).

[6] *Hearings on H.R. 2498*, supra note 1, at 1005.

[7] *See* United States v. Vogan, 35 M.J. 32, 33 (C.M.A. 1992) (noting that Articles 10 and 33 combine to form one of "five sources of the right to a speedy trial in the military"). The other four sources include the Sixth Amendment, the Due Process Clause of the Fifth Amendment, R.C.M. 707, and case law. *Id.*

[8] *See* United States v. Jackson, 5 M.J. 223, 226 (C.M.A. 1978) (stating that the provisions of Articles 10 and 33, "if followed, foresee early assignment of military defense counsel").

[9] *See* Article 4(a); Article 30(b); Article 33; R.C.M. 301(b); 308(a)-(b); 701(a)(6); and 1304(b)(2)(f)(v); *see also* R.C.M. 1009(c)(1)-(2) (requiring clarification of an ambiguous sentence as soon as "practical").

6. Recommendation and Justification

Recommendation 33: Move the requirement for prompt forwarding of charges in cases involving pretrial arrest or confinement from Article 33 to Article 10.

- Article 33 is based upon antiquated ideas concerning how cases are processed and the speed at which they are processed. The rule is derived from a 1948 Article of War that was based on a 1920 Article of War that required service of charges in eight days after the imposition of restraint and the actual trial just ten days after service. While the 10-day requirement from the 1920 Articles of War was later dropped, the 1948 version of the statute still required service of charges within eight days of the imposition of restraint. In addition, Congress added a requirement to Article 33 that was not present in the Articles of War: that the Article 32 report of investigation be forwarded along with the charges. Under current practice, there are few cases where an Article 32 hearing will be held, let alone completed, within 8 days.

- Article 33 only applies to cases where a person is ordered into arrest or confinement pending trial by general court-martial. Moving the language in Article 33 to Article 10 will promote efficient processing of all cases involving pretrial arrest or confinement.

7. Relationship to Objectives and Related Provisions

- This proposal will support MJRG Operational Guidance by enhancing prompt pretrial processing and disposition of offenses.

- Article 33 in its present form would be deleted, and a new provision would be inserted—"Disposition Guidance."

Article 33 (New Provision) – Disposition Guidance
10 U.S.C. § 833

1. Summary of Proposal

This proposal would enact a new Article 33 requiring the establishment of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This Disposition Guidance would draw upon the Principles of Federal Prosecution ("DOJ Guidelines") in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes of military law. Part II of this Report will contain a complete draft of the proposed disposition guidance, for inclusion in the Manual for Courts-Martial as an appendix.

2. Summary of the Current Statute

Under current law, convening authorities may not refer a charge to court-martial for trial in the absence of a determination that the charge is supported by probable cause. In general courts-martial, this probable cause determination is made by the staff judge advocate pursuant to Article 34, and is informed by the Article 32 hearing officer's report. In special and summary courts-martial, the probable cause screening can be performed by any judge advocate, or by the convening authority.[1] Article 30 directs commanders and convening authorities to dispose of charges and specifications "in the interest of justice and discipline."

3. Historical Background

Before 1920, convening authorities exercised virtually unfettered discretion to dispose of charges and specifications against an accused, including by referring the charges to court-martial for trial.[2] Article 70 of the 1920 Articles of War contained the first requirement for pre-referral staff judge advocate advice. This was a procedural requirement only and the convening authority was not required to follow the advice, even if the staff judge advocate determined there was insufficient evidence to prosecute the accused.[3] When the UCMJ was enacted in 1950, Congress provided, in Article 34, that convening authorities themselves must determine that a charge is supported by probable cause before referring the charge to

[1] *See* R.C.M. 601(d)(1).

[2] *See, e.g.*, MCM 1905, at 19 (requiring only that the commanding officer investigate the charges and "state in his indorsement whether or not, in his opinion, the charges can be sustained").

[3] AW 70, ¶3 of 1920 ("Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.").

general court-martial; and, in Article 30, Congress specified that commanders and convening authorities must dispose of charges and specifications "in the interest of justice and discipline."[4] In 1983, Congress amended Article 34 to transfer the probable cause screening function in general courts-martial from the convening authority to the staff judge advocate.[5] In 1984, the President set forth the first Manual provision, R.C.M. 306, to expressly provide a "policy" for the disposition of offenses by military commanders and convening authorities.[6]

4. Contemporary Practice

R.C.M. 601(d)(1) provides that a convening authority generally may refer charges to any court-martial as long as "the convening authority finds or is advised by a judge advocate" that there is probable cause for the specification and that the specification alleges an offense. In general court-martial cases, this function is always performed by the staff judge advocate pursuant to Article 34. The rule further provides that the convening authority may rely on information from any source when making the referral decision, including hearsay and other evidence that may not be admissible at trial.[7]

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[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. During the Congressional hearings on the proposed UCMJ in 1949, Colonel Melvin Maas suggested that the standard for referral of charges to general court-martial should be raised to "beyond a reasonable doubt," to align the standard with applicable civilian charging standards in felony trials. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 712 (1949). The Committee demurred that the applicable civilian charging standard would be a "prima facie determination," and did not adopt the proposal.

[5] Military Justice Act of 1983, Pub. L. No. 98-209, § 4(a)(2), 97 Stat. 1393.

[6] R.C.M. 306(b) ("Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition . . . ."). The Discussion to R.C.M. 306(b) notes that "[t]he disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced . . . . The goal should be a disposition that is warranted, appropriate, and fair." The Discussion provides a non-exclusive list of "disposition factors" for commanders and convening authorities to consider, including: the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; when applicable, the views of the victim as to disposition; existence of jurisdiction over the accused and the offense; availability and admissibility of evidence; the willingness of the victim or others to testify; cooperation of the accused in the apprehension or prosecution of another accused; possible improper motives or biases of the person(s) making the allegation(s); availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and appropriateness of the authorized punishment to the particular accused or offense. Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,013-14 (June 18, 2014).

[7] *See, e.g.*, United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993) ("The convening authority is not required to screen the evidence to ensure its admissibility. In fact, the decision to prosecute may be premised on evidence which is incompetent, inadmissible, or even tainted by illegality."). The requirement for probable cause is consistent with the first sentence—but not the second—of the ABA Standards concerning the exercise of prosecutorial discretion in the charging decision: "A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." ABA STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9(a).

5. Relationship to Federal Civilian Practice

Military charging practice and federal civilian charging practice differ significantly with respect to the decisional principles used to determine when charges should be referred to court-martial or federal criminal court for trial. In federal civilian practice, probable cause is the ethical floor for charging; above that floor, attorneys are guided by robust decision rules and charging standards that help to structure and guide the exercise of prosecutorial discretion. The Principles of Federal Prosecution ("DOJ Guidelines") contained in the United States Attorneys' Manual provide the following decision rule with respect to the charging decision:

> The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:
>
> (1) No substantial Federal interest would be served by prosecution;
>
> (2) The person is subject to effective prosecution in another jurisdiction; or
>
> (3) There exists an adequate non-criminal alternative to prosecution."[8]

In addition to this rule for the charging decision, the DOJ Guidelines provide structured guidance regarding plea agreements, non-criminal alternative dispositions, and wide range of other matters impacting or implicating prosecutorial discretion.[9] In military practice, the broad admonition in Article 30 to dispose of charges and specifications "in the interest of justice and discipline" and the R.C.M. 306 factors are not similarly structured.[10]

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[8] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220 (Grounds for Commencing or Declining Prosecution) [hereinafter USAM]. Most state jurisdictions employ similar charging standards, with some form of the "sufficient admissible evidence" criterion. *See, e.g.* Denver District Attorney Policies, The Charging Decision ("If a determination is made that the facts do not support a reasonable belief that the charge can be proven beyond a reasonable doubt, there is a legal and ethical duty to decline to file charges."); WASH. REV. CODE ANN. § 9.94A.411 ("Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.").

[9] *See, e.g.*, USAM, *supra* note 8, at § 9-27.250 (Non-criminal Alternatives to Prosecution) ("In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including: (1) The sanctions available under the alternative means of disposition; (2) The likelihood that an effective sanction will be imposed; and (3) The effect of non-criminal disposition on Federal law enforcement interests.").

[10] *Compare* R.C.M. 306(b) (Discussion) (instructing commanders and convening authorities to consider and balance the disposition factors "to the extent practicable . . . .") *with* USAM, *supra* note 8, at § 9-27.001 ("These principles of Federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility."). *See generally* Rachel E.

6. Recommendation and Justification

Recommendation 33.2: Create a new statutory provision requiring the establishment of non-binding guidance—taking into account the Principles of Federal Prosecution in the U.S. Attorney's Manual with appropriate consideration of military requirements—regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline.

- This proposal would help to "fill the gap" that currently exists in military practice between the probable cause standard for referral of charges to court-martial and the "beyond a reasonable doubt" standard for conviction. In civilian practice, this gap has been filled with structured decisional principles and charging standards to help guide prosecutors in the prudent and effective exercise of prosecutorial discretion. In military practice, the disposition decision-making guidance under Article 30 and R.C.M. 306(b) is relatively unstructured.

- The proposed disposition guidance would provide structured decisional principles to help guide commanders and convening authorities—as well as the staff judge advocates, judge advocates, and legal officers who advise them in all military justice matters—in the effective exercise of disposition discretion "in the interest of justice and discipline" in individual cases.

- Part II of this Report will contain a complete draft of the proposed disposition guidance, for inclusion in the Manual for Courts-Martial as an appendix.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by incorporating, to the extent practicable, the standards and procedures of the civilian sector with respect to the exercise of prosecutorial discretion.

8. Legislative Proposal

SEC. 604. DISPOSITION GUIDANCE.

Section 833 of title 10, United States Code (article 33 of the Uniform Code of Military Justice), is amended to read as follows:

"**§833. Art. 33. Disposition guidance**

VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389 (2014).

"The President shall direct the Secretary of Defense to issue, in consultation with the Secretary of Homeland Security, non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.".

9. Sectional Analysis

Section 604 contains a complete revision of Article 33. The current statute concerning forwarding of charges in general courts-martial when the accused is in confinement would be incorporated into the closely related provisions in Article 10. Article 33, as amended, would require the establishment and maintenance of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This disposition guidance would draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law. In doing so, the proposed guidance would enhance the disposition decision-making process and better align military charging practice with the standards and principles applicable in most civilian jurisdictions. The proposed disposition guidance would be issued by the Department of Defense, and would be included in the Manual for Courts-Martial as an appendix.

Article 34 – Advice of Staff Judge Advocate and Reference for Trial

10 U.S.C. § 834

1. Summary of Proposal

This proposal would amend Article 34 to clarify ambiguities in the language of the current statute and to expressly tie the staff judge advocate's pre-referral disposition recommendation to the "in the interest of justice and discipline" standard for disposition of charges and specifications under Article 30(b). This proposal would further amend Article 34 to require that convening authorities consult a judge advocate on relevant legal issues before referral of charges and specifications to special courts-martial for trial, consistent with current practice.

2. Summary of the Current Statute

Article 34 concerns the relationship between the staff judge advocate and the convening authority in the disposition decision-making process in general court-martial cases. The article contains three subsections. Article 34(a) requires convening authorities to obtain advice from their staff judge advocates before referring charges and specifications to general court-martial for trial; it also prohibits convening authorities from referring any specification to general court-martial unless the staff judge advocate finds that: (1) the specification alleges an offense; (2) the specification is "warranted by the evidence" contained in the Article 32 preliminary hearing report, if there is such a report; and (3) a court-martial would have jurisdiction over the accused and the offense. Article 34(b) requires the staff judge advocate's advice to include a written and signed statement providing conclusions on the three threshold legal issues as well as a recommendation to the convening authority regarding the disposition of each specification. The staff judge advocate's recommendation must accompany any specification referred for trial. Article 34(c) authorizes formal corrections to the charges and specifications, as well as changes to conform them to the evidence contained in the Article 32 report.

3. Historical Background

Article 34 did not come into its current form until the Military Justice Act of 1983. Before 1920, the convening authority exercised near total discretion to refer charges against a military accused to general court-martial for trial.[1] The first statutory requirement for pre-referral staff judge advocate advice appeared in Article 70 of the 1920 Articles of War, which combined various pretrial requirements that are now spread across Articles 10, 30,

[1] *See, e.g.*, MCM 1905, at 19 (requiring only that the commanding officer investigate charges before referring them to a court-martial, and that he "state in his indorsement whether or not, in his opinion, the charges can be sustained").

32, 33, 34, and 35 of the UCMJ. Paragraph 3 of Article 70 required simply that, "Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice."[2] This was a procedural requirement only; the convening authority was not obliged to follow the staff judge advocate's advice, even if the staff judge advocate determined there was insufficient evidence to prosecute the accused.

In the Elston Act of 1948, Congress moved the requirement for pre-referral staff judge advocate advice from Article 70 to Article 47(b) and placed a statutory prohibition on the convening authority's ability to refer charges to a general court-martial when certain legal thresholds were not met following review of the report of investigation under Article 46(b) (the precursor to Article 32 of the UCMJ):

> Before directing the trial of any charge by general court-martial the convening authority will refer it to his staff judge advocate for consideration and advice; and no charge will be referred to a general court-martial for trial unless *it has been found that* a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation.[3]

The passive construction of "unless it has been found that . . ." was ambiguous, but seemed to indicate that the staff judge advocate was responsible for determining whether the charge was legally sufficient and sustained by the evidence. When Congress enacted the UCMJ two years later, the drafters clarified this ambiguity by explicitly vesting the convening authority—not the staff judge advocate—with the power to determine the threshold legal issues.[4] Under the new Article 34, the convening authority was prohibited from referring charges to general court-martial unless the convening authority personally determined that the charge alleged an offense under the Code and was warranted by the evidence in the Article 32 report.[5] Congress also added a new subsection (now subsection

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[2] AW 70 of 1920, at ¶3; *see Establishment of Military Justice—Proposed Amendment of the Articles of War: Hearing on S. 64 Before a Subcomm. Of the S. Comm. on Military Affairs*, 66th Cong. 283-84 (1919) (statement of Samuel T. Ansell) ("[A] commanding general can not court-martial a man at will. These two things must have been done; his law officer must have said, 'The investigation that has been made has produced evidence that justifies a trial'; that is, prima facie proof; and, too, the law officer must have said that the charges as drafted are legally sufficient to allege an offense against the Articles of War. Now, then, after that the commanding general may or may not, as he pleases, court-martial the man.").

[3] AW 47(b) of 1948 (emphasis added).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1006-1009 (1949) [hereinafter *Hearings on H.R. 2498*].

[5] *See* Article 34(a) prior to 1983 amendments ("The convening authority shall not refer a charge to a general court martial for trial unless *he has found* that the charge alleges an offense under this code and is warranted by the evidence indicated in the report of the investigation.") (emphasis added). Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950) (amended 1983)); *see also* United States v. Greenwalt, 20 C.M.R. 285, 288 (C.M.A. 1955) ("By law, the final responsibility for determining whether charges are to be referred for

(c)) to the statute to clarify that formal corrections and conforming changes to the charges and specifications could be made to make them consistent with the evidence brought out in the Article 32 investigation without requiring a new investigation on the charges.[6]

In 1983, Congress revised Article 34 extensively, bringing the statute into its present form.[7] Language that had previously been in Article 34(a) which allowed the convening authority to obtain the required pre-referral advice from a legal officer instead of the staff judge advocate was removed.[8] Congress then updated the staff judge advocate advice consistent with what appeared to be the original intent of this provision under the Elston Act, by vesting referral "veto" authority with the staff judge advocate rather than the convening authority himself.[9] This change conformed the statute to the practice as it had developed in the decades since the UCMJ was enacted; it also acknowledged that the legality of the charges, the legal sufficiency of the evidence, and court-martial jurisdiction "involve complex legal determinations" best addressed by legally trained staff judge advocates.[10] The 1983 amendments moved subsection (b) to subsection (c) and created a new subsection (b), specifying the required content of the staff judge advocate's advice: (1) a signed, written statement of the staff judge advocate's conclusions with respect to charge sufficiency, probable cause, and jurisdiction; and (2) a recommendation of the action that the convening authority should take regarding each specification.[11] This secondary requirement implicitly tied the staff judge advocate's recommendation under Article 34 to the disposition standard articulated in Article 30(b)—"in the interest of justice and discipline"—mirroring the requirement in Article 32(a) that the Article 32 investigating officer provide "a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."[12] However, this connection was never made explicitly in the statute.

4. Contemporary Practice

The President has implemented Article 34 across several different rules in the Manual for Courts-Martial. R.C.M. 406, 407, and 601 implement Article 34(a)-(b), repeating the

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trial, and the kind of court-martial before which they are to be heard, rests with the convening authority. While he is required to consult with his legal adviser before such reference, he is not required to follow the recommendation which he receives. When as here, there is an actual conflict between the investigating officer's recommendation and the one submitted by his counselor, the convening authority may accept either.").

[6] *Hearings on H.R. 2498*, *supra* note 4, at 1006.

[7] Military Justice Act of 1983, Pub. L. No. 98-209, § 4(a)-(b), 97 Stat. 1393.

[8] *Id.* at § 4(a)(1).

[9] *Id.* at § 4(a)(2).

[10] S. REP. NO. 98-53, at 4, 16-17 (1983).

[11] Pub. L. No. 98-209, at § 4(b).

[12] Article 32(a), prior to NDAA FY 2014 amendments.

statutory provisions concerning the content of the staff judge advocate advice and providing additional rules and procedures applicable to referral of charges and specifications to all courts-martial. R.C.M. 603 expands on Article 34(c), providing additional rules and procedures for making "minor" and "major" changes to the charges and specifications before and after referral in all three types of court-martial. R.C.M. 601(d)(1) provides that a convening authority generally may refer charges to any court-martial as long as "the convening authority finds or is advised by a judge advocate" that there is probable cause for the specification and that the specification alleges an offense. In general court-martial cases, this function is always performed by the staff judge advocate.

With respect to the additional required content of the staff judge advocate advice prior to referral of charges and specifications to general courts-martial, the rules themselves repeat the statutory provisions while providing little additional guidance. The Discussion to R.C.M. 406(b) explains that the "warranted by the evidence" standard under Article 34(a)(2) means probable cause.[13] It also explains:

> The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and the recommendation of the Article 32 investigating officer. However, there is no legal requirement to include such information, and failure to do so is not error.[14]

Because the staff judge advocate's recommendation concerns referral of charges and specifications by the convening authority, this statutory requirement implicitly implicates R.C.M. 601 (Referral), which directs convening authorities to "consider the options and considerations under R.C.M. 306 in exercising the discretion to refer."[15] As noted earlier in this Report, R.C.M. 306 provides that all allegations of offenses (including preferred charges and specifications) should be disposed of in a timely manner at the lowest appropriate level of disposition.[16] The Discussion to R.C.M. 306(b) then provides a non-exclusive list of factors military commanders should consider when deciding how to dispose of offenses. These "disposition factors" form the President's core policy guidance with respect to the "in

[13] R.C.M. 406(b) (Discussion); *see* United States v. Engle, 1 M.J. 387, 389 n.4 (C.M.A. 1976) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

[14] R.C.M. 406(b) (Discussion). In the 1969 MCM, this guidance (other than the last sentence stating that a discussion and analysis of the evidence by the staff judge advocate is not required) formed a part of the rule that implemented Article 34; however, it was moved to the non-binding discussion section in the 1984 Manual. *Compare* MCM 1969, ¶35*c. with* R.C.M. 406(b) (Discussion), at ¶2; *see also* S. REP. NO. 98-53, at 17.

[15] R.C.M. 601(d)(1) (Discussion).

[16] R.C.M. 306(b).

the interest of justice and discipline" disposition standard articulated in Article 30(b), and help to inform the staff judge advocate's pre-referral advice under Article 34(b). However, under the current rules, the connection between staff judge advocate's advice under R.C.M. 406 and this disposition policy guidance under R.C.M. 306 is not explicitly drawn.

5. Relationship to Federal Civilian Practice

Referral of charges and specifications to court-martial for trial under Article 34 and R.C.M. 601 is similar in many respects to the indictment or information under Fed. R. Crim. P. 7. In both cases, the purpose of the action is to officially direct that an accused be criminally prosecuted on the charges in a court of law; and in both cases, the action generally signals that the government has considered alternative dispositions and has determined that the interest of justice—or, in the case of the military, the interest of justice and discipline—warrants prosecution. In this sense, the exercise of disposition discretion by court-martial convening authorities under Article 30 and 34 is akin to the exercise of prosecutorial discretion by attorneys for the government in federal civilian practice. In military practice, this responsibility is split between two officials: the staff judge advocate, who is responsible for making legal determinations and providing legal advice; and the convening authority, who is responsible for balancing the interests of justice and discipline appropriately in each individual case. The decision rules used to guide the exercise of disposition discretion by the convening authority and the staff judge advocate are addressed in greater detail in this Report in the section concerning proposed Article 33 (Disposition Guidance).

6. Recommendation and Justification

Recommendation 34.1: Amend Article 34 to clarify ambiguities in the language of the current statute and to explicitly tie the staff judge advocate's recommendation to the "in the interest of justice and discipline" standard under Article 30(b).

- Currently, Article 34 contains several ambiguities that hinder its application, including the use of the term "refer" in different contexts in subsection (a), and the requirement for a recommendation from the staff judge advocate under subsection (b) that is not clearly tied to the disposition standard articulated in Article 30(b).

- This proposal would clarify the language of the statute and the relationship between the staff judge advocate's advice under Article 34 and the general standard for disposition of charges and specifications under Article 30. It also would include a new subsection defining the term "referral" as "the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial." This definition would help to provide consistency throughout the Code with respect to usage of the terms "refer" or "referral" in the context of charging.

- Part II of the Report will consider additional changes in the rules implementing Article 34, with particular focus on the content of advice with respect to the staff judge advocate's conclusion regarding probable cause and jurisdiction. Part II of the Report will also address the content of the staff judge advocate's advice on those

matters in which the staff judge advocate disagrees with the conclusions of the preliminary hearing officer. This will take into account the recommendation of the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) "to evaluate if there are circumstances when a general court-martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court-martial."[17]

Recommendation 34.2: Amend Article 34 to require the convening authority to consult with a judge advocate on relevant legal issues before referral of charges to special courts-martial.

- This change would codify current practice, and would amount to a minor change to the rule concerning referral of charges generally under R.C.M. 601(d). It also would enhance the decision-making relationship between convening authorities and judge advocates and ensure greater consistency in the exercise of disposition discretion by convening authorities generally.

- Part II of the Report will propose changes in the rules implementing Article 34 to reflect the requirement for judge advocate consultation on relevant legal issues in special courts-martial. The proposed rules will include baseline requirements and guidance, and will provide flexibility for service-specific regulations and procedures concerning the method and manner of the required judge advocate consultation. This flexibility will ensure that different services will be able to tailor the new requirement to their specific needs and personnel structures.

Recommendation 34.3: Amend Article 34 to clarify that formal corrections to the charges and specifications may be made before referral for trial in special court-martial cases as well as in general courts-martial.

- Under current law, Article 34 applies only in the context of general court-martial cases. This change would clarify that the ability to make formal corrections to the charges and specifications before referral for trial is not exclusive to charges that are being referred to general courts-martial. This change is necessitated by the proposal to require, in the statute, judge advocate advice prior to referral of charges and specifications to special courts-martial.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by considering the recommendations, proposals, and analysis issued by the Response Systems Panel.

- This proposal supports MJRG Operational Guidance by incorporating, to the extent practicable, the standards and procedures of the civilian sector with respect to the

[17] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49 (Recommendation 116) (June 2014).

charging decision. Specifically, this proposal requires pre-referral legal advice from legally trained judge advocates in all general and special court-martial cases, which would result in greater consistency among convening authorities in the decision to prosecute offenders, and enhancement of the standards used to determine when to exercise referral authority.

- This proposal is closely related to the proposed creation of a new Article 33, which would provide a statutory requirement for the issuance of robust disposition guidance based on the Principles of Federal Prosecution contained in the United States Attorneys' Manual.

8. Legislative Proposal

SEC. 605. ADVICE TO CONVENING AUTHORITY BEFORE REFERRAL FOR TRIAL.

Section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), is amended to read as follows:

"§834. Art. 34. Advice to convening authority before referral for trial

"(a) GENERAL COURT-MARTIAL.—

"(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.—Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—

"(A) the specification alleges an offense under this chapter;

"(B) there is probable cause to believe that the accused committed the offense charged; and

"(C) a court-martial would have jurisdiction over the accused and the offense.

"(2) STAFF JUDGE ADVOCATE RECOMMENDATION AS TO DISPOSITION.—Together with the written advice provided under paragraph (1), the staff judge advocate shall provide a written recommendation to the convening authority as to the disposition that should be made of the specification in the interest of justice and discipline.

"(3) STAFF JUDGE ADVOCATE ADVICE AND RECOMMENDATION TO ACCOMPANY REFERRAL.—When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate under paragraph (1) and the written recommendation of the staff judge advocate under paragraph (2) with respect to each specification shall accompany the referral.

"(b) SPECIAL COURT-MARTIAL; CONVENING AUTHORITY CONSULTATION WITH JUDGE ADVOCATE.—Before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues.

"(c) GENERAL AND SPECIAL COURTS-MARTIAL; CORRECTION OF CHARGES AND SPECIFICATIONS BEFORE REFERRAL.—Before referral for trial by general court-

martial or special court-martial, changes may be made to charges and specifications—

"(1) to correct errors in form; and

"(2) when applicable, to conform to the substance of the evidence contained in a report under section 832(c) of this title (article 32(c)).

"(d) DEFINITION.—In this section, the term 'referral' means the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial.".

9. Sectional Analysis

Section 605 would amend Article 34, which concerns the relationship between the staff judge advocate and the convening authority in the disposition decision-making process in general court-martial cases. The section would amend Article 34 to clarify ambiguities in the language of the current statute, to require judge advocate consultation before referral of charges to special courts-martial, and to expressly tie the staff judge advocate's pre-referral disposition recommendation in general courts-martial to the "in the interest of justice and discipline" standard for disposition of charges and specifications under Article 30. As amended, Article 34 would contain the following provisions:

Article 34(a) would replace and clarify the provisions concerning staff judge advocate advice before referral to general courts-martial currently contained in Article 34(a)-(b). Article 34(a)(2) would expressly tie the staff judge advocate's disposition recommendation to the "in the interest of justice and discipline" disposition standard under Article 30.

Article 34(b) would require that convening authorities consult a judge advocate on relevant legal issues before referral of charges and specifications to special courts-martial for trial, consistent with current practice.

Article 34(c) would allow formal corrections to the charges and specifications to be made before referral in both general and special courts-martial.

Article 34(d) would define "referral," in the context of Article 34, to mean "the order of the convening authority that charges and specifications against an accused be tried by a specified court-martial," consistent with current implementing regulations.

The changes to Article 34 are intended to solidify and enhance the decision-making partnership between judge advocates and court-martial convening authorities, ensuring that the interests of justice and discipline are well-considered and appropriately balanced in each individual case. Implementing regulations will address additional changes in the rules implementing Article 34, with particular focus on the content of advice with respect to the staff judge advocate's conclusion regarding probable cause and jurisdiction, and with respect to those matters in which the staff judge advocate disagrees with the conclusions of the preliminary hearing officer. Implementing regulations also would address the baseline requirements for pre-referral judge advocate consultation on relevant legal issues in special courts-martial.

Article 35 – Service of Charges
10 U.S.C. § 835

1. Summary of Proposal

This proposal would clarify the current statute with no substantive changes. Part II of the Report will consider whether changes are needed in the rules implementing Article 35.

2. Summary of the Current Statute

Article 35 contains two related procedural requirements. First, it requires the trial counsel to serve a copy of referred court-martial charges upon the accused. Second, in time of peace, it provides for a "waiting period" which must be observed after service of charges before the accused may be brought to trial against his objection: five days for general court-martial; three days for special court-martial.

3. Historical Background

Article 35 is based in part on the second half of Article 46(c) of the 1920 Articles of War and was also "in accordance with present Navy practice" at the time of the UCMJ's enactment in 1950.[1] In contrast with Article 33, which forms a part of the military accused's speedy trial rights, Article 35 was designed to protect the accused against a "too speedy trial."[2] This protection "is closely intertwined with the basic right of an accused and his counsel to have adequate time, before trial, to prepare their case and, once trial has begun, to conduct the defense."[3] The statute has remained unchanged in the decades since.[4]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1012 (1949) [hereinafter *Hearings on H.R. 2498*]; *see* AGN 43 of 1930.

[2] *Hearings on H.R. 2498*, *supra* note 1, at 1012; *see* United States v. Cherok, 22 M.J. 438, 440 (C.M.A. 1986) ("Article 35 provides a shield with which an accused may prevent too speedy a trial, not a sword with which an accused may attack the Government for failing to bring him to trial sooner.").

[3] Lt Col Robert S. Stubbs II, USMC, *Delays in Trial*, 15 JAG JOURNAL 39, 42 (1961).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. During the House Subcommittee's hearings on the UCMJ in 1949, the only aspect of Article 35 that sparked any debate was that the statutory three-day and five-day waiting period requirements were only to apply "in time of peace." Chairman Elston pointed out that it seemed odd to limit these accused-friendly protections to peacetime court-martial cases since "most of the complaints [giving rise to the UCMJ] arose during wartime and by reason of wartime prosecutions." *Hearings on H.R. 2498*, *supra* note 1, at 1013. After some discussion of this topic, the Subcommittee determined that the waiting periods were not required by policy or law and merely constituted an "added protection in time of peace." *Id*. at 1014.

4. Contemporary Practice

Article 35's service and waiting period requirements are implemented through R.C.M. 602, which restates these requirements and clarifies that the dates of service and of trial (but not Sundays or holidays) are excluded for purposes of calculating the three-day and five-day waiting periods. If the government violates the required waiting period and the accused objects, the trial may not proceed until the end of the waiting period; however, if the accused does not object the right to delay is deemed waived and the trial may proceed.[5] The Discussion to R.C.M. 901(a) (Call to order) notes Article 35's waiting period requirement and instructs military judges to "secure an affirmative waiver on the record" if it appears from the referred charge sheet that the required waiting period has not elapsed. Neither Article 35 nor its implementing rules have resulted in a significant amount of litigation in the decades since the UCMJ's adoption.[6]

5. Relationship to Federal Civilian Practice

Article 35's "service of charges" requirement functionally corresponds to Fed. R. Crim. P. 9 (Arrest Warrant or Summons on an Indictment or Information). The primary purpose of both rules is to notify the accused that the accused will soon be prosecuted for certain charges, and that the court has these charges for action.[7] Article 35 requires the trial counsel to serve a copy of the charges on the accused. Under the federal rule, the court itself is responsible for issuing the warrant or summons.[8] The federal analogue to Article 35's waiting period requirement resides in Section 3161(c)(2) of the Speedy Trial Act.[9] The statute imposes a mandatory 30-day delay before trial following the defendant's first appearance through counsel (or express waiver of counsel), unless the defendant consents to a shorter time period.[10]

Although the three-day and five-day waiting periods under Article 35 are shorter than the 30-day delay under the federal rule, this difference is less significant in practice in light of

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[5] *See, e.g.*, United States v. Williams, 54 M.J. 757, 759 (C.G.C.C.A. 2001).

[6] *But see, e.g.*, *Cherok*, 22 M.J. at 440 (C.M.A. 1986) (the accused may not use the waiting period under Article 35 to create a speedy trial violation by the government); United States v. Desiderio, 31 M.J. 894, 896 (A.F.C.M.R. 1990) (no prejudice where someone other than the trial counsel signed Block 15 of the charge sheet indicating they "caused the charges to be served" on the accused pursuant to Article 35).

[7] By contrast, FED. R. CRIM. P. 4 and 5 are more analogous to the initial notification to the accused of the charges and specifications under Article 30(b) and R.C.M. 308.

[8] FED. R. CRIM. P. 9(a); *see* MCM, App. 21 (R.C.M. 602, Analysis) ("The warrant system of Fed. R. Crim. P. 9(a), (b)(1), and (c)(2) is unnecessary in military practice.").

[9] 18 U.S.C. §§ 3161-3174.

[10] *Id.* at § 3161(c)(2); *see also* United States v. Reynolds, 781 F.2d 135, 136 (8th Cir. 1986) (noting the Speedy Trial Act's "30-day provision operates to support a criminal defendant's Sixth Amendment right to effective assistance of counsel by assuring 'that a defendant be given a reasonable time to obtain counsel and that counsel be provided a reasonable time to prepare the case.").

other aspects of military practice. First, a military accused is notified of the charges "as soon as practicable" after preferral under Article 30, and is generally provided with a defense counsel and a copy of the charge sheet at this time.[11] Second, it is rare for the accused to be brought to trial within thirty days after preferral, particularly in general courts-martial cases, and Article 40 provides for continuances "as often as may appear to be just." Thus, the three-day and five-day waiting periods following referral of charges do not appreciably impact an accused's ability to fully prepare for trial over the course of at least several weeks (and generally much more time) prior to arraignment.

6. Recommendation and Justification

Recommendation 35: Amend Article 35 by dividing it into two subsections and revising the language of its two substantive provisions—the service of charges and waiting period requirements—to better align the article with current practice and related UCMJ articles.

As currently drafted, the purpose and function of Article 35's two procedural requirements contain several ambiguities. The proposed language for Article 35's service of charges requirement would clarify and simplify this provision while avoiding ambiguous use of the term "refer." The proposed language for Article 35's waiting period requirement (updated with the subheading "Commencement of Trial") would conform this part of the article to current practice by ensuring that the military judge inquires on the record whether the accused objects in a case where the government schedules the first session of trial within the statutory waiting period. It also would address ambiguities in the statute with respect to the starting and ending points of the three-day and five-day waiting periods.

This proposal would revise Article 35's "[i]n time of peace . . ." limitation to read: "This subsection shall not apply in time of war." This change would provide greater consistency between Article 35 and other UCMJ articles that include "time of war" exceptions, including Articles 43, 71, 85, 90, 101, 105, 106, 112a, and 113.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by clarifying ambiguities in the language of Article 35 while retaining and improving its two key provisions, which provide significant procedural safeguards for the accused in military criminal proceedings.

The proposal also would better align Article 35 with its corresponding MCM provisions and current practice, as well as with other statutory exceptions for "in time of war," minimizing the opportunity for misapplication of the statute or renewed appellate activity concerning its language and intent.

[11] *See* R.C.M. 307 and 401.

8. Legislative Proposal

SEC. 606. SERVICE OF CHARGES AND COMMENCEMENT OF TRIAL.

Section 835 of title 10, United States Code (article 35 of the Uniform Code of Military Justice), is amended to read as follows:

"§835. Art. 35. Service of charges; commencement of trial

"(a) IN GENERAL.—Trial counsel detailed for a court-martial under section 827 of this title (article 27) shall cause to be served upon the accused a copy of the charges and specifications referred for trial.

"(b) COMMENCEMENT OF TRIAL.—(1) Subject to paragraphs (2) and (3), no trial or other proceeding of a general court-martial or a special court-martial (including any session under section 839(a) of this title (article 39(a)) may be held over the objection of the accused—

"(A) with respect to a general court-martial, from the time of service through the fifth day after the date of service; or

"(B) with respect to a special court-martial, from the time of service through the third day after the date of service.

"(2) An objection under paragraph (1) may be raised only at the first session of the trial or other proceeding and only if the first session occurs before the end of the applicable period under paragraph (1)(A) or (1)(B). If the first session occurs

before the end of the applicable period, the military judge shall, at that session, inquire as to whether the defense objects under this subsection.

"(3) This subsection shall not apply in time of war.".

9. Sectional Analysis

Section 606 would amend Article 35, which requires the trial counsel to ensure that a copy of the charges and specifications is served upon the accused following referral of charges. Article 35 also provides the accused with the opportunity, in time of peace, to object to the commencement of trial until the completion of a statutory period following service of charges—three days for special courts-martial, and five days for general courts-martial. These requirements, consistent with similar procedural requirements in federal district court, would ensure that military accused receive sufficient notice of the charges upon which they are to be tried by court-martial, and sufficient time to prepare for trial with their defense counsel. The present statute contains ambiguities with respect to each of these statutory requirements. The proposed revision would address these ambiguities and make other clarifying and conforming changes, none of which alter the purposes of Article 35.

Subchapter VII. Trial Procedure

Article 36 – President May Prescribe Rules
10 U.S.C. § 836

1. Summary of Proposal

This Report recommends no change to Article 36.

2. Summary of the Current Statute

Article 36 provides broad authority to the President to prescribe rules for pretrial, trial, and post-trial procedures, including modes of proof for courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry. The statute allows the President to prescribe rules which, so far as the President considers practicable, apply the principles of law and the rules of evidence generally applicable in United States district court, so long as those rules are not contrary to or inconsistent with other statutory provisions of the UCMJ. Article 36 also requires all rules and regulations prescribed by the President to be uniform so far as practicable.

3. Historical Background

As early as 1813, Congress provided statutory authority for the President to prescribe rules and procedures for courts-martial and military justice practice.[1] When the UCMJ was enacted in 1950, Congress derived Article 36 from similar statutory provisions in Article 38 of the Articles of War. The proposed Article 48 of the Articles for the Government of the Navy, by contrast, would have given rule-making authority to the Secretary of the Navy.[2] Article 36 was included in the UCMJ in order to standardize this rule-making authority in the President, and in order to ensure that the rules prescribed by the President would conform to the Federal Rules of Criminal Procedure insofar as practicable.[3] In 1979, Congress clarified the breadth of the President's authority to issue rules governing pretrial, trial, and post-trial procedures.[4] In 2006, Congress amended Article 36 to provide exceptions in the case of military commissions established under chapter 47A of title 10.[5]

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[1] Act of March 3, 1813, ch. 52, § 5. *See generally* MCM, App. 21 (R.C.M. Analysis, Introduction).

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1014 (1949) [hereinafter *Hearings on H.R. 2498*].

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498*, *supra* note 2, at 1016-19.

[4] Dep't of Defense Authorization Act, 1980, Pub. L. No. 96-107, tit. VII, § 801(b), 93 Stat. 803, 811 (1979); *see also* NDAA FY 1991, Pub. L. No. 101-510, § 1301(4), 104 Stat. 1668 (1990) (repealing provisions requiring reporting of regulations to Congress).

[5] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(3), 120 Stat. 2600 (2006).

4. Contemporary Practice

Article 36 is the basis for the Rules for Courts-Martial, the Military Rules of Evidence, and any other executive order pertaining to military justice practice. Typically, rules that are prescribed by the President under the authority of Article 36 are proposed by and reviewed within the Department of Defense and in the Executive Branch under established procedures governing the preparation of executive orders by the Joint Service Committee on Military Justice.[6] The President's rule-making authority is broad, and is generally only limited by the Constitution and the UCMJ itself.[7]

5. Relationship to Federal Civilian Practice

The Supreme Court promulgates most procedural and evidentiary rules in the federal courts under the Rules Enabling Act.[8] These rules have the weight of law, provided that there is "no contrary congressional command."[9] Generally, these rules are based on the recommendations of a standing advisory committee. After the committee adopts a new rule, the rule is forwarded to Congress, which has the authority to reject the rule. Congress may also create its own rules pursuant to statute.[10] Generally, the Rules for Courts-Martial tend to be much more detailed than the Federal Rules of Criminal Procedure, reflecting the relative brevity of the UCMJ and consequent extent of Presidential authority under Art. 36.

6. Recommendation and Justification

Recommendation 36: No change to Article 36.

In view of the well-developed case law addressing the President's authority to prescribe rules under Article 36, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by maintaining the statutory requirement that the rules implementing the UCMJ apply the standards and practices of the civilian sector insofar as practicable.

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[6] *See* MCM, App. 26.

[7] *See* United States v. Smith, 32 C.M.R. 105, 118 (C.M.A. 1962) (holding Article 36 to be a valid delegation to the President of the power, by regulations, to prescribe the procedure, including modes of proof, in cases before courts-martial); *see also* THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 112-9 at 498-99 (2013) (reciting the President's concurrent authority, with Congress, to prescribe the jurisdiction and procedure of courts-martial and military commissions utilizing his "Commander and Chief" powers (U.S. CONST. art II, § 2, cl. 1)).

[8] 28 U.S.C. § 2072.

[9] 28 U.S.C. § 2072 (b). *See* American Exp. Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308 (2013) (explaining that the intent and scope of Federal Rules of Civil Procedure govern unless they conflict with express congressional intent in countervailing statute).

[10] *See, e.g.*, FED R. EVID. 413 historical note (e) (Application).

Article 37 – Unlawfully Influencing Action of Court
10 U.S.C. § 837

1. Summary of Proposal

This Report recommends no change to Article 37. Part II of the Report will consider whether any changes are needed in the rules implementing Article 37.

2. Summary of the Current Statute

Article 37 contains a series of proscriptions concerning improper influence in court-martial proceedings. Article 37(a) prohibits: (1) censures, reprimands, or admonishments of the military judge, counsel, or any member of a court-martial by the convening authority or any other commanding officer; (2) attempts to coerce or improperly influence the action of a court or any member thereof with respect to the findings or sentence in any case by any person subject to the Code; and (3) attempts to coerce or improperly influence the convening authority or other approving/reviewing authority by any person subject to the Code. Statements and instructions provided to the court in the normal course of a trial are exempted from these prohibitions. Subsection (b) of the statute prohibits use of an individual's performance of duty as a member of a court-martial or an attorney's zealous representation of an accused as the basis for an unfavorable performance evaluation or fitness report of the member.

3. Historical Background

Congress derived Article 37 from Article 88 of the Articles of War.[1] As enacted in 1950 and as set forth today, the statute prohibits the convening authority from improperly influencing the law officer (a predecessor to the military judge, who advised the court-martial members) or the counsel assigned to the case.[2] The statute does not prohibit a reviewing authority from making comment on errors of the court in the course of a proper review or from taking appropriate action when a member of the court acted in such manner that he abandoned his or her judicial responsibilities and duties.[3] In addition, the statute does not prohibit military commanders from providing general instructions as to the state of discipline within their commands.[4] In 1968, Congress replaced the term "law officer" with "military judge" to reflect the introduction of military judges into the military

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1019 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *Hearings on H.R. 2498*, supra note 1, at 1019.

[4] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 26 (1951).

justice system, and it added the remainder of subsection (a) and all of subsection (b) to the statute.[5]

4. Contemporary Practice

The President has implemented Article 37 through R.C.M. 104, which provides additional clarification concerning the statutory prohibitions. Article 37(b) also has been implemented through M.R.E. 606(b), which recognizes unlawful command influence as a legitimate subject of inquiry when inquiring into the validity of the findings or sentence of a court-martial. The case law addressing the statute is well-developed.[6]

5. Relationship to Federal Civilian Practice

Although there are federal statutes which prohibit influencing or obstructing federal civilian courts and court officers—for example, 18 U.S.C. §§ 1501-21 (Obstruction of Justice)—these are punitive statutes more closely related to UCMJ Article 134 (Obstructing justice) in Part IV of the Manual.[7] Federal civilian courts are standing courts, which makes comparison to courts-martial imprecise. Each court-martial is a temporary tribunal convened to consider a specific case, and is convened by a military commander who has the power to refer charges for trial; to select the members of the court; to approve or disapprove a variety of legal issues related to pretrial confinement and witnesses; and to exercise extensive administrative powers with respect to the duties, assignments, and careers of the accused, the members, witnesses, and others. In these respects, Article 37 addresses issues unique to the military environment.

6. Recommendation and Justification

Recommendation 37: No change to Article 37.

In view of the well-developed case law addressing Article 37 and the rules implementing it, a statutory change is not necessary.

Part II of the Report will consider whether any changes are needed to ensure the rules reflect the current state of the law and adequately reflect the authority to engage in appropriate command activities, including lawful command emphasis with respect to disciplinary matters.

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[5] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(13)(A)-(D), 82 Stat. 1335.

[6] *See, e.g.*, United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999) (outlining the applicable standard in reviewing cases for unlawful command influence); United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003) (examining the circumstances under which unlawful command influence and the appearance of unlawful command influence may impermissibly constrain the discretion of the officer involved in the disposition of the charges or the impartiality of the court-martial members); Weiss v. United States, 510 U.S. 163 (1993) (denying a due process challenge concerning the independence of military judges, noting the statutory protections against unlawful command influence in the UCMJ, including those found in Article 37).

[7] MCM, Part IV, ¶96.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique statutory provision that protects against undue command influence and which the Supreme Court has recognized as playing a significant role in protecting the due process interests of accused military members in court-martial proceedings.

Article 38 – Duties of Trial Counsel and Defense Counsel
10 U.S.C. § 838

1. Summary of Proposal

This proposal would conform the provisions of Article 38 addressing assistant defense counsel to the related provisions in Article 27. Part II of the Report will consider whether changes are need needed to the rules with respect to defense counsel's post-trial responsibilities in light of changes to Article 60 and this Report's proposals to modify post-trial procedures.

2. Summary of the Current Statute

Article 38 details the duties and responsibilities of trial and defense counsel and provides the accused with various rights regarding his legal representation. Article 38(a) states that counsel for the government shall be appointed in every general or special courts-martial and that the trial counsel is responsible for preparing a record of the proceedings. The accused's rights to be represented by military counsel, civilian counsel, or specific military counsel upon request are outlined in Article 38(b). Subsection (c) addresses the defense counsel's role in clemency matters under Article 60. Subsections (d) and (e) address the duties and qualification requirements of assistant trial and defense counsel. These provisions expressly authorize assistant trial counsel (in a general court-martial) and assistant defense counsel (in a general or special court-martial) who are not qualified under Article 27(b) to perform the duties of trial and defense counsel under the direction of counsel so qualified.

3. Historical Background

When the UCMJ was enacted in 1950, Congress derived Article 38, in part, from Articles 17, 11 and 116 of the Articles of War, as well as a proposed Article for the Government of the Navy.[1] In 1981, Article 38(b) was amended to: (1) add provisions relating to the right to counsel at an Article 32 hearing; (2) authorize promulgation of regulations relating to the reasonable availability of military counsel; and (3) authorize the detailing of additional military defense counsel under specified circumstances.[2] In 1983, subsection (b)(7) was modified to provide that regulations defining "reasonable availability" could not prescribe

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1021 (1949).

[2] Act of November 20, 1981, Pub. L. No. 97-81, §4(b), 95 Stat. 1085, 1088 (1981).

any limitations based on the fact the individual military counsel requested is from a different branch of service than the accused.[3]

Prior to World War II, an accused was provided military defense counsel at courts-martial; however, the counsel provided often lacked formal legal training, even when charges were referred to general courts-martial. When the UCMJ was enacted, Congress addressed this situation by adding a requirement into Article 27 that lawyers be appointed as defense counsel in all general courts-martial.[4] However, in special courts-martial, the detailed military defense counsel was required to be a lawyer only if the trial counsel was a lawyer.[5] In the Military Justice Act of 1968, Congress amended Article 27 to require that a lawyer be appointed as defense counsel unless such appointment would be impracticable based on physical conditions or military exigencies; and it limited the punishment that could be imposed at court-martial if the detailed defense counsel was not qualified under Article 27(b).[6] Currently, Article 19 (Jurisdiction of special courts-martial) does not permit a bad-conduct discharge to be adjudged unless Article 27(b)-qualified defense counsel is detailed to represent the accused.

4. Contemporary Practice

The President has implemented Article 38 through R.C.M. 502, 506, 808, and 1103(b). The accused's rights to military counsel, civilian counsel, and specific military counsel upon request are outlined in R.C.M. 506(a)-(b). R.C.M. 502(d) requires defense counsel and associate defense counsel in general and special courts-martial, and trial counsel in general courts-martial, to be certified under Article 27(b). The services currently detail judge advocates to serve as assistant defense counsel who are qualified under Article 27(b). Article 38(c), concerning the defense counsel's role in clemency matters, is addressed in R.C.M. 502(d)(6) and 1105(a)-(b), which detail the rules and procedures for submitting post-trial clemency matters to the convening authority. R.C.M. 808 and 1103(b) implement Article 38(a)'s requirement that the trial counsel prepare the record of proceedings following each court-martial.

5. Relationship to Federal Civilian Practice

The duties of trial and defense counsel under Article 38 are largely similar to those of federal prosecutors, who represent the United States in U.S. district court, and civilian defense attorneys, who represent federal defendants. The military trial counsel's duty under Article 38(a) to prosecute "in the name of the United States" is similar to the responsibility of U.S. Attorneys in the federal civilian system to act as the attorney for the

[3] Military Justice Act of 1983, Pub. L. No. 98-209, §3(e), 97 Stat. 1393, 1394-95 (1983).

[4] Article 27(b)(1).

[5] Article 27(c)(2) (1950-68).

[6] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(10), 82 Stat. 1335, 1337 (1968).

government in all criminal prosecutions.[7] However, in federal civilian practice, the court reporter, not the U.S. Attorney, is responsible for preparing the record of trial.[8] By contrast, under Article 38(a), record preparation is the responsibility of the trial counsel.[9] (In addition, military trial counsel are typically responsible for a whole host of administrative responsibilities—courthouse security, witness travel, reviewing defense witness requests, and other duties—that are primarily performed by other personnel in the federal civilian system.) In the federal civilian system, defendants in criminal cases have the right to representation by an attorney at all stages of prosecution. The defendant may hire an attorney or, if indigent, have counsel appointed at the government's expense.[10] Under Article 38(b), an accused has the right to at least one free military defense counsel in all general and special courts-martial, irrespective of indigence, and has an additional right to hire a civilian defense counsel at no cost to the government.

6. Recommendation and Justification

Recommendation 38: Amend Article 38(e) to delete reference to an assistant defense counsel who is not qualified to be defense counsel as required by Article 27(b).

The proposed change would require all defense counsel, regardless of whether they are acting as lead or assistant defense counsel, to be qualified under Article 27(b). This change is consistent with the actual practice of all of the services, and would align military rules in this area with federal civilian practice.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by employing civilian standards for the qualification of government and defense counsel insofar as practicable.

This proposal also supports MJRG Operational Guidance by removing an inconsistency between Article 38 and current practice with respect to the qualification requirements of detailed defense counsel and assistant defense counsel.

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[7] *See* Judiciary Act of 1789, 1 Stat. 92 (providing for the appointment "in each district of a meet person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in each district all delinquents for crimes and offenses, recognizable under the authority of the United States, and all civil actions in which the United States shall be concerned"); 28 U.S.C. § 547(1) ("[E]ach United States attorney, within his district, shall prosecute for all offenses against the United States . . . .").

[8] 28 U.S.C. § 753(b).

[9] Article 38(a); R.C.M. 1103(b), (c).

[10] FED. R. CRIM. P. 44(a).

8. Legislative Proposal

SEC. 701. DUTIES OF ASSISTANT DEFENSE COUNSEL.

Subsection (e) of section 838 of title 10, United States Code (article 38 of the Uniform Code of Military Justice), is amended by striking ", under the direction" and all that follows through "(article 27),".

9. Sectional Analysis

Section 701 would amend Article 38 to conform it to the proposed amendments in Article 27 concerning the requirement for all defense counsel in general and special courts-martial to be qualified under Article 27(b).

Article 39 – Sessions
10 U.S.C. § 839

1. Summary of Proposal

This proposal would codify current practice under which military judges preside at arraignments. This proposal also would conform Article 39 to the proposed amendments to Articles 16 and 19, which provide for a military judge to preside at all general and special courts-martial.

2. Summary of the Current Statute

Article 39 provides the authority and basic rules for post-referral sessions of court conducted outside the presence of the court-martial members. Article 39(a) authorizes a military judge, after service of referred charges under Article 35, to hold proceedings without the presence of members for the purpose of: (1) hearing and determining pretrial motions; (2) hearing and ruling upon any matter that does not require member involvement; (3) holding the arraignment and receiving the pleas of the accused; and (4) performing any other procedural function that does not require the presence of the members. Article 39(b)-(c) require all proceedings, including those conducted pursuant to Article 39(a), to be made part the record of trial and to be conducted in the presence of the accused, the defense counsel, and the trial counsel. Article 39(d) prohibits the use of findings and holdings of military commissions in any Article 39(a) session.

3. Historical Background

When the UCMJ was enacted in 1950, there were no military judges and Article 39 contained only the provisions that are now set forth in subsection (c), requiring all proceedings of the court to be on the record except for member deliberations.[1] In 1968, when the position of military judge was created, Article 39 was amended to provide for trial sessions conducted by the military judge without the presence of the members.[2] In 2006, Congress separated what is now subsection (b) from subsection (a) and added a video teleconferencing provision.[3] In 2009, Congress added subsection (d) concerning military commissions under chapter 47A.[4]

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(15), 82 Stat. 1335, 1338 (1968).

[3] NDAA FY 2006, Pub. L. No. 109-163, § 2, Div. A, Title V, Subtitle E, (Sec. 556), 119 Stat. 3126, 3266 (2006).

[4] NDAA FY 2010, Pub. L. No. 111-84, Div. A, Title XVIII, § 1803(a)(2), 123 Stat. 2190, 2612 (2009).

4. Contemporary Practice

Currently, military judges are not detailed to cases or proceedings under the UCMJ until charges have been referred for trial by court-martial. Once referred, it is common practice for military judges, pursuant to Article 39(a), to arraign the accused and hold pretrial hearings to consider and determine pretrial motions and other matters related to the court-martial.[5] Article 39(a) sessions are also used to resolve issues raised during the course of trial which should not be discussed within the presence of members, such as arguments concerning the admissibility of evidence. The President has implemented Article 39 through R.C.M. 803, which generally tracks the language of the statute. The Discussion to R.C.M. 803 notes that Article 39(a) sessions should be held:

> to ascertain the accused's understanding of the right to counsel, the right to request trial by military judge-alone, or when applicable, enlisted members, and the accused's choices with respect to these matters; dispose of interlocutory matters; hear objections and motions; rule upon other matters that may legally be ruled upon by the military judge, such as admitting evidence; and perform other procedural functions which do not require the presence of members.

5. Relationship to Federal Civilian Practice

Federal civilian courts are standing courts with no direct analogy to courts-martial, which are temporary tribunals convened to consider a specific case.[6] There is no need in the federal civilian system for an express statutory authority for sessions of court held outside the presence of the jurors.

6. Recommendation and Justification

Recommendation 39.1: Amend Article 39 to establish uniform requirements for arraignment by a military judge and to eliminate references to courts-martial without a military judge.

This is primarily a conforming change to reflect the proposed amendments to Articles 16 and 19, which require a military judge to preside at all general and special courts-martial. The proposal also would codify the longstanding practice of using military judges for arraignments.

This recommendation only relates to post-referral sessions of court in the context of convened general and special courts-martial. This Report's proposal to enact a new Article 30a concerning pre-referral proceedings is discussed in detail in that section of the Report.

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[5] *See* R.C.M. 803 (Discussion).

[6] *See* McClaughry v. Deming, 186 U.S. 49, 63 (1902) ("A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved.").

Recommendation 39.2: Amend Article 39 to conform to the proposal under Article 53 for judicial sentencing in all non-capital general courts-martial and all special courts-martial.

This is a conforming change to reflect the proposed amendments to Articles 53. The change would clarify that the military judge may call the court into session without the presence of the members for the purpose of conducting a sentencing proceeding and sentencing the accused.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by preserving a unique feature of the UCMJ that is necessary for the proper administration of justice given the temporary, *ad hoc* nature of courts-martial.

The recommended amendments reflect proposed changes in Articles 16 and 19 to eliminate courts-martial without a military judge.

8. Legislative Proposal

SEC. 702. SESSIONS.

Section 839 of title 10, United States Code (article 39 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by striking paragraph (3) and inserting the following new paragraphs:

"(3) holding the arraignment and receiving the pleas of the accused;

"(4) conducting a sentencing proceeding and sentencing the accused; and"; and

(2) in the second sentence of subsection (c), by striking ", in cases in which a military judge has been detailed to the court,".

9. Sectional Analysis

Section 702 would amend Article 39 to codify current practice, in which military judges preside at arraignments. The amendments also would conform the statute to the proposed amendments to Articles 16, 19, and 53 requiring military judges to be detailed to preside

over and to sentence the accused in all non-capital general courts-martial and all special courts-martial.

Article 40 – Continuances
10 U.S.C. § 840

1. Summary of Proposal

This proposal would modify Article 40's reference to "a court-martial without a military judge" to conform to this Report's proposal to require a military judge in all special courts-martial.

2. Summary of the Current Statute

Article 40 provides statutory authority for the military judge of a general or special-court-martial, a special court-martial without a military judge, or a summary court-martial to order continuances at the request of either party "for reasonable cause." The statute also provides that continuances may be granted "for such time, and as often, as may appear to be just."

3. Historical Background

The authority to grant continuances was first codified in the Articles of War of 1898.[1] This first version of the statute included a provision that if the prisoner was in close confinement, the trial could not be delayed for longer than sixty days. This provision was removed in 1916.[2] Article 40, as originally drafted, was derived verbatim from the 1920 version of the statute.[3] Because the position of military judge was not created until 1968, the original version of Article 40 gave the authority to grant continuances exclusively to "[the] court-martial."[4] The article has been amended twice in the decades since inclusion of this provision in the UCMJ as enacted in 1950. In 1956, Congress added "the law officer" as an authority that may grant continuances under the article in addition to a court-martial without a law officer;[5] and in 1968, Congress inserted "military judge" in place of "law officer," bringing Article 40 into its current form.[6]

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[1] AW 93 of 1898.

[2] AW 20 of 1916.

[3] *See* AW 20 of 1920; *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1025 (1949) [hereinafter *Hearings on H.R. 2498*].

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; s*ee Hearings on H.R. 2498*, *supra* note 3, at 1025.

[5] The Act of August 10, 1956, ch. 1041, 70A Stat. 51.

[6] The Military Justice Act of 1968, Pub. L. No. 90-632, § 2(16), 82 Stat. 1339.

4. Contemporary Practice

The President has implemented Article 40 through R.C.M. 906(b)(1), which states that "[a] continuance may be granted only by the military judge." Previously, convening authorities possessed an overlapping authority to order "postponements."[7] This authority was determined to conflict with the military judge's authority to schedule proceedings and control the docket, and it was therefore removed from the 1984 Manual.[8] Under current law, the decision whether to grant a continuance is a matter within the discretion of the military judge, who evaluates the particular facts and circumstances of each case.[9] "Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member."[10] In order to obtain a continuance, the moving party must show by a preponderance of the evidence that prejudice to the party's substantial rights will occur absent a continuance.[11] In *United States v. Miller*, the Court of Appeals for the Armed Forces provided a list of factors "used to determine whether a military judge abused his or her discretion by denying a continuance."[12] The list includes "'surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.'"[13] The military Courts of Criminal Appeals continue to apply the *Miller* factors when reviewing military judge denials of continuance requests for abuse of discretion.[14]

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[7] MCM 1969, ¶58*a*.

[8] *See* MCM, App. 21 (R.C.M. 906(b)(1), Analysis).

[9] *See* R.C.M. 906(b)(1) (Discussion); United States v. Maresca, 28 M.J. 328, 333 (C.M.A. 1989); *see generally* Lt Col William W. Brooks, *The Continuance in Courts-Martial*, 15 A.F. L. REV. 173 (1973).

[10] R.C.M. 906(b)(1) (Discussion); *see, e.g.*, *Maresca*, 28 M.J. at 333 (the military judge may grant the government continuances in order to obtain the presence of witnesses at a court-martial).

[11] United States v. Allen, 31 M.J. 572, 620 (N.M.C.M.R. 1990); *see also* United States v. Dunks, 1 M.J. 254 (C.M.A. 1976) (military judges should be liberal in granting continuances where good cause for the delay exists); United States v. Livingston, 7 M.J. 638 (A.C.M.R. 1979) (continuance requests should be granted unless the request appears to be unreasonable, or made on frivolous grounds solely for delay).

[12] United States v. Miller, 47 M.J. 352, 358 (C.A.A.F. 1997).

[13] *Id.* (quoting FRANCIS GILLIGAN AND FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 18-32.00 at 704 (1991)).

[14] *See, e.g.*, United States v. Weisbeck, 50 M.J. 461, 464-65 (C.A.A.F. 1999) (the military judge abused his discretion by denying defense request nine days before trial for a continuance to arrange for the testimony of an expert witness, where the testimony of the expert was the heart of the intended defense, there was no available substitute for the testimony, the requested continuance was for less than six weeks, the government asserted no prejudice arising from a continuance, and the only justification for denying the continuance was expeditious processing).

5. Relationship to Federal Civilian Practice

Although there is no analogous federal rule specifically covering continuances, Article 40 and the case law interpreting it are generally consistent with longstanding federal common law rules concerning the trial judge's discretionary authority to grant pretrial and trial continuances.[15] As the Supreme Court noted in *Avery v. State of Alabama* in 1940:

> In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.[16]

Similarly, in *Morris v. Slappy*, the Court characterized the discretion that must be granted to trial courts on matters of continuances as "broad," and stated that "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."[17]

6. Recommendation and Justification

Recommendation 40: Amend Article 40 by deleting the words "a court-martial without a military judge" and replacing them with the words "a summary court-martial."

This proposal is based on this Report's proposal to amend Article 16 to eliminate special courts-martial without a military judge. This change would better align the UCMJ with contemporary military justice practice, in which special courts-martial without a military judge are rarely, if ever, convened. It also would better align military practice with the practice in federal district courts, where there is no procedure for a trial without a judge.

Although Article 40, in its current form, does not expressly reference "a special court-martial without a military judge," the proposed amendment would clarify the article's meaning and would help to distinguish the authority to grant continuances, which extends to summary courts-martial, from other UCMJ provisions that would be eliminated as a result of the proposed amendment to Article 16.

The reference to summary courts-martial in the amendment reflects the fact that a military judge does not preside in that forum.

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[15] *See also* 18 U.S.C. § 3161(h)(7)(A) (excluding delay resulting from a continuance granted by a judge when "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial").

[16] 308 U.S. 444, 446 (1940). *See also* Ungar v. Sarafite, 376 U.S. 575, 589 (1964) ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.") (citations omitted).

[17] Morris v. Slappy, 461 U.S. 1, 11-12 (1983) (quoting *Ungar*, 376 U.S. at 589).

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and Article 36 of the UCMJ by incorporating, to the extent practicable, the principles of law and the rules of procedure used in the trial of criminal cases in the United States district courts into military justice practice.

This recommendation is related to the proposed amendment to Article 16 to eliminate special courts-martial without a military judge.

8. Legislative Proposal

SEC. 703. TECHNICAL AMENDMENT RELATING TO CONTINUANCES.

Section 840 of title 10, United States Code (article 40 of the Uniform Code of Military Justice), is amended by striking "court-martial without a military judge" and inserting "summary court-martial".

9. Sectional Analysis

Section 703 would make a technical amendment to Article 40 to clarify that "a summary court-martial" is the narrow exception to the general rule that the authority to grant continuances is vested solely in the military judge, with no substantive change to the law. This change would conform the statute to the proposed amendments to Articles 16 and 19 requiring military judges to be detailed to preside over all general and special courts-martial, and would better align military practice regarding continuances with federal civilian practice.

Article 41 – Challenges
10 U.S.C. § 841

1. Summary of Proposal

This proposal would align Article 41 with the changes proposed in Article 16 concerning fixed panel sizes and elimination of special courts-martial without a military judge. Part II of the Report will consider changes that would be needed in the rules implementing Article 41 based on these proposed statutory amendments. Part II of the Report will also address application of the liberal grant mandate with respect to "for cause" challenges by the parties in general and special courts-martial.

2. Narrative Summary of the Current Statute

Article 41 provides that the military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause; it also provides each party with one peremptory challenge with respect to the members only. The statute vests authority for determining the relevance and validity of all challenges for cause with the military judge—or, in the case of a special court-martial without a military judge, with the court-martial itself. Subsections (a)(2) and (b)(2) of the statute provide the procedures applicable when the exercise of challenges reduces the court-martial below the minimum number of members required under Article 16.

3. Historical Background

Congress derived Article 41 from Article 18 of the Articles of War.[1] The statute adopted the then-existing Army and Navy practice with respect to challenges for cause, and the Army practice with respect to peremptory challenges.[2] In 1991, Congress amended Article 41 to provide procedures applicable in situations where the exercise of challenges reduces the court-martial below the minimum number of members required under Article 16.[3] In 1968, Congress established the position of military judge for all general and most special courts-martial and authorized the military judge to rule on challenges.[4]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1025-26 (1949).

[2] *Id*.

[3] NDAA FY 1991, Pub. L. No. 101-510, § 541(b), 104 Stat. 1565 (1990).

[4] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(17), 82 Stat. 133.

4. Contemporary Practice

The President has implemented Article 41 through R.C.M. 902 (concerning disqualification of military judges) and R.C.M. 912 (concerning member challenges). R.C.M. 912(f)(1) expands upon Article 41(a)(1) and identifies fourteen specific grounds for challenging and removing members for cause. Until 1984, the Manual provided that challenges for cause should be "liberally granted" to both parties.[5] Under current case law, the liberal grant standard applies only to defense challenges for cause.[6]

5. Relationship to Federal Civilian Practice

Military courts often follow federal case law concerning the grounds for challenge.[7] Military courts and federal district courts differ, however, in the number of peremptory challenges allowed for each party. In military practice, each party is entitled to only one peremptory challenge in all types of cases.[8] In the federal civilian system, the number of peremptory challenges allowed is based on the type of case: in a capital case, each party is entitled to twenty peremptory challenges; in a non-capital felony case, the defense is entitled to ten peremptory challenges while the government is entitled to only six; and in misdemeanor cases, each party is allowed three peremptory challenges.[9] The vast majority of states provide the government and defense with the same number of peremptory challenges regardless of the type of case.[10] In every state, the number of peremptory challenges is greater than one and generally ranges between three and ten.[11]

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[5] *See, e.g.*, MCM 1951, ¶62*h.*(2) ("Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger."); *see also* MCM 2012, App. 21 (R.C.M. 912(f)(3), Analysis).

[6] *See, e.g.*, United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005) (citing the convening authority's selection of the court members and the limited peremptory challenges available to the accused in holding the liberal grant policy did not apply to Government challenges for cause).

[7] *See, e.g.,* United States v. Santiago-Davila, 26 M.J. 380, 392-93 (C.M.A. 1988) (applying the Supreme Court's ruling on race based challenges in Batson v. Kentucky, 476 U.S. 79 (1986) to courts-martial practice); United States v. Witham, 47 M.J. 297, 303 (C.A.A.F. 1997) (applying the Supreme Court's ruling on gender based challenges in J.E.B. v. Alabama *ex rel.* T.B ., 511 U.S. 127, 130-31 (1994)).

[8] R.C.M. 912(g)(1).

[9] FED. R. CRIM. P. 24(b)(1).

[10] *See, e.g.*, Pa. R. Crim. P. Rule 634; Mont. Code Ann. § 46-16-116; ILCS S. Ct. Rule 434; Miss. Code Ann. § 99-17-3; T. C. A. § 40-18-118; West's F.S.A. § 913.08; C.G.S.A. § 54-82g; 22 Okl. St. Ann. § 655; N.R.S. 175.051; I.C. § 19-2016; O.R.S. § 136.230; N.C.G.S.A. § 15A-1217.

[11] *See, e.g.*, Mont. Code Ann. § 46-16-116; ILCS S. Ct. Rule 434; West's F.S.A. § 913.08; 22 Okl. St. Ann. § 655; N.R.S. 175.051; I.C. § 19-2016.

6. Recommendation and Justification

Recommendation 41: Amend Article 41 to align the statute with changes proposed in Article 16 concerning fixed panel sizes and elimination of special courts-martial without a military judge. Specifically: (1) amend Article 41(a)(1) to delete reference to courts-martial without a military judge; and (2) amend Article 41(a)(2) and (b)(2) to delete the word "minimum."

These are conforming amendments. The underlying legislative proposals and justifications are provided in the section in this Report addressing proposed amendments to Article 16.

Part II of the Report will consider changes that would be needed in the rules implementing Article 41 based on these proposed statutory amendments. It will also address application of the liberal grant mandate with respect to "for cause" challenges by each party in general and special courts-martial.[12]

7. Relationship to Objectives and Related Provisions

The proposal to eliminate the reference to special courts-martial without a military judge in Article 41(a)(1) is related to proposed changes to Article 16 to eliminate special courts-martial without a military judge.

The proposal to delete the word "minimum" in Article 41(a)(2) and (b)(2) is related to the proposal to amend Article 16 to set fixed panel sizes.

8. Legislative Proposal

SEC. 704. CONFORMING AMENDMENTS RELATING TO CHALLENGES.

Section 841 of title 10, United States Code (article 41 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)(1), by striking ", or, if none, the court," in the second sentence;

(2) in subsection (a)(2) by striking "minimum" in the first sentence; and

(3) in subsection (b)(2), by striking "minimum".

[12] *See generally* United States v. Smart, 21 M.J. 15 (C.M.A. 1985) (addressing the importance of ensuring that the court-martial panel is composed of individuals with a fair and open mind).

9. Sectional Analysis

Section 704 would amend Article 41 to conform the statute to the changes proposed in Article 16 concerning standard panel sizes in general and special courts-martial and the elimination of special courts-martial without a military judge. The statute's implementing rules would address application of the "liberal grant mandate" with respect to "for cause" challenges by each party in a general or special court-martial. *See United States v. Smart,* 21 M.J. 15 (C.M.A. 1985) (addressing the importance of ensuring that the court-martial panel is composed of individuals with a fair and open mind).

Article 42 – Oaths
10 U.S.C. § 842

1. Summary of Proposal

This Report recommends no change to Article 42. Part II of the Report will consider whether any changes are needed in the rules implementing Article 42.

2. Summary of the Current Statute

Article 42 requires all participants in a court-martial (including judges, attorneys, members, reporters, and interpreters) to take an oath that they will perform their duties faithfully. The statute allows each Service Secretary to control the manner and form of the oath, and specifically requires that all witness testimony must be given under oath.

3. Historical Background

Taking oaths to perform court duties faithfully or to swear to tell the truth has long been a practice in the military justice system. The first oath requirements appeared in the original Articles of War of 1775.[1] When the UCMJ was enacted in 1950, Article 42 was derived from Article 19 of the 1948 Articles of War.[2] With the exception of minor updates, the statute has changed little since 1950.[3]

4. Contemporary Practice

The President has implemented Article 42 through R.C.M. 807. Under the rule, military judges, attorneys, and court reporters swear to faithfully perform their duties when they assume their position. They are not required to repeat the oath with each new court-martial. Panel members are re-sworn with each new court-martial, regardless of any previous oaths. Witnesses are generally sworn in the first time they testify, but do not need to be re-sworn if they testify again in the same court-martial. R.C.M. 807 provides examples of oaths for various participants. Article 136 lists the persons who are authorized to administer oaths for military justice purposes.

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[1] AW 33 of 1775 (requiring all members of the court-martial to serve under oath; empowering President of the court-martial to place witnesses under oath).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1029 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 95-98 (1951).

[3] Act of Congress, August 10, 1956, ch. 1041, 70A Stat. 51; The Military Justice Act of 1968, Pub. L. No. 90-632, § 2(18), 82 Stat. 1339; Military Justice Act of 1983, Pub. L. No. 98-209, §§ 2(e), 3(f), 97 Stat. 1393, 1395.

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice concerning the taking of oaths by participants in criminal proceedings are generally similar.[4] In federal civilian practice, jurors take two oaths: a preliminary oath as prospective jurors before voir dire; and an impanelment oath if selected to serve on the jury. In military practice, the substance of the two oaths is combined into a single oath given to members before the court-martial is assembled.

6. Recommendation and Justification

Recommendation 42: No change to Article 42.

The law governing oaths in the military is long-established, noncontroversial, and aligned with similar federal civilian rules. No statutory changes are necessary.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 42.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline assessment. Based on the stability in the case law dealing with Article 42's substantive provisions, no change is warranted.

[4] *See* 28 U.S.C.A. § 453 (oath requirement for federal judges); 28 U.S.C.A. § 544 (oath requirement for attorneys representing the government); FED. R. EVID. 603 (oath requirement for witnesses).

Article 43 – Statute of Limitations
10 U.S.C. § 843

1. Summary of Proposal

This proposal would amend Article 43 to align military practice with federal civilian practice by extending the statute of limitations applicable to child abuse offenses and offenses in which DNA evidence implicates an identified individual. The proposal also would extend the statute of limitations for offenses under Article 83 (Fraudulent enlistment, appointment, or separation).

2. Summary of the Current Statute

Article 43 sets forth the statute of limitations under the UCMJ. Article 43(a) specifies certain offenses that may be tried and punished at any time without limitation, including: murder; rape and sexual assault; rape and sexual assault of a child; and any other offense punishable by death. Article 43(b)(1) sets a default statute of limitations for all other offenses at five years. Article 43(b)(2) creates an exception for child abuse offenses, which may be tried at a court-martial within five years or during the life of the child, whichever provides a longer period. Subsections (d)-(g) of the statute provide additional rules and exceptions applicable in other special situations, including time of war exceptions and periods in which an accused is absent from territory in which the United States has the authority to apprehend him, or is in the custody of civil authorities or enemy forces.

3. Historical Background

Article 88 of the 1806 Articles of War specified a two-year limitations provision, including a tolling provision in cases of unauthorized absence, and courts-martial have been bound by a time limitations provision since that time.[1] Article 39 of the 1920 Articles of War provided a statute of limitations of two years for most offenses; three years for desertion in time of peace, damage to federal property, and certain other federal offenses; and no statute of limitations for desertion during time of war, murder, and mutiny.[2] Articles 61 and 62 of the Articles for the Government of the Navy established a two-year limitation period that began to run on the date the offense was committed, with an exception for desertion in time of peace, in which case the limitation period began to run at the end of the accused's enlistment.[3] These articles further provided for the suspension of the running of

[1] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 984 (photo reprint 1920) (2d ed. 1896); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-6 (9th ed. 2015).

[2] AW 39 of 1920.

[3] AGN 61 and 62 of 1930. *See* LTJG C. R. Davis, USN, *The Statute of Limitations*, 1950 JAG Journal 7, 7-8 (1950).

the statute under certain circumstances, and for its tolling upon the issuance of an order for trial or punishment.[4]

When the UCMJ was enacted in 1950,[5] Congress included a statute of limitations in Article 43 of three years for most offenses, which was raised to five years in 1986.[6] Under the original version of Article 43, the only offenses subject to punishment without limitation were desertion or absence without leave in time of war, aiding the enemy, mutiny, or murder.[7] In 2003, Congress added a provision based on 18 U.S.C. § 3283 (Offenses against children), providing a statute of limitations in child abuse cases of five years or the life of the child, whichever period is longer.[8] In 2006, Congress added "rape, or rape of a child" to the list of offenses subject to punishment without limitation under Article 43(a),[9] and in 2014 this provision was expanded again to include "sexual assault" and "sexual assault of a child" in addition to "rape" and "rape of a child."[10]

4. Contemporary Practice

The President has implemented Article 43 through R.C.M. 907(b)(2)(B), which provides the accused with waivable grounds for dismissal of charges when the applicable statute of limitations under Article 43 has run.

5. Relationship to Federal Civilian Practice

The statute of limitations provisions under Article 43 are largely consistent with the statutes of limitations applicable to similar offenses in federal civilian practice under Title 18. Article 43, however, provides a shorter statute of limitations for child abuse offenses when the victim is no longer alive. Under Article 43(b)(2)(A), the limitation period is five years or the life of the child, whichever is longer; under 18 U.S.C. § 3283 the statute of limitations is ten years or the life of the child, whichever is longer. In 2006, Congress raised the limitations period in the Title 18 provision from five years to ten years.

In cases where DNA testing implicates an identified person in the commission of a felony, 18 U.S.C. § 3297 provides that "no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following

[4] *Id.*

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] NDAA FY 1987, Pub. L. No. 99-661, § 805, 100 Stat. 3905 (1986).

[7] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1031-33 (1949).

[8] Pub. L. No. 99-661, tit. VIII, § 805(a), 100 Stat. 3905 (1986). This amendment resulted from a decision by the Court of Appeals for the Armed Forces in *United States v. McElhaney*, in which the court held that the statute of limitations contained in 18 U.S.C. § 3283 did not apply to courts-martial. 54 M.J. 120, 124-5 (C.A.A.F. 2000).

[9] NDAA FY 2006, Pub. L. No. 109-163, §§ 552(e)-553(a), 119 Stat. 3136 (2006).

[10] NDAA FY 2014, Pub. L. No. 113-66, § 1703, 127 Stat. 672 (2013).

the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period."

6. Recommendation and Justification

Recommendation 43.1: Amend Article 43 to increase the statute of limitations applicable to child abuse offenses from the current 5 years or the life of the child, whichever is longer, to 10 years or life of the child, whichever is longer.

This change would align Article 43(b)(2)(A) with 18 U.S.C. § 3283, which was amended in 2006 to increase the statute of limitations applicable for child abuse offenses from five to ten years.

Recommendation 43.2: Amend Article 43 by adding a new subsection (h) to extend the statute of limitations for Article 83 fraudulent enlistment cases from five years, as it currently stands, to: (1) the length of the enlistment, in the case of enlisted members; (2) the length of the appointment, in the case of officers; or (3) five years, whichever is longer.

Under current law, a servicemember who commits the offense of fraudulent enlistment would be subject to prosecution for violation of Article 83 until five years from the day he or she began receiving pay. Some enlistments and appointments last six years or more, and servicemembers may be in inactive-duty status for several years while receiving education. Such servicemembers may enter the service fraudulently (for example, by lying about violent crimes committed under another name before enlisting) and only disclose that fact, voluntarily or involuntarily, after the statute of limitations for the offense under Article 83 has already run.[11] When these scenarios arise, courts have strictly applied the 5-year limitations period under Article 43.[12]

This proposal would enhance the ability of the armed services to prosecute fraudulent enlistment offenses and avoid the scenario where an enlistment or appointment has been premised on false information and deception, but the servicemember is permitted to evade prosecution, and even to reenlist, because five years has elapsed since the servicemember first received pay or allowances.

Recommendation 43.3: Amend Article 43 by adding a new subsection (i) to extend the statute of limitations when DNA testing implicates an identified person in the commission

[11] *See* SCHLUETER, *supra* note 1, at § 5.2[3][c].

[12] *See* United States v. Victorian, 31 M.J. 830, 832 (N.M.C.M.R. 1990) (plea of guilty to fraudulent enlistment improvident where prosecution of the offense was barred by the statute of limitations and the record of trial failed to indicate that the accused was aware of the bar); United States v. Jackson, 18 M.J. 753, 756 (A.C.M.R. 1984) (defense counsel's failure to raise the statute of limitations that barred the accused's conviction for fraudulent enlistment fell below minimum standards of competence); United States v. Farano, 60 M.J. 932, 934 (N-M. Ct. Crim. App. 2005) (accused's fraudulent enlistment not complete until two months after making false statements because of delayed enlistment program, and statute of limitations does not begin until the receipt of pay or allowances).

of an offense by excluding periods prior to the DNA implication in computing the period of limitations.

This change would align Article 43 with 18 U.S.C. § 3297 which extends the limitation period in specified circumstances where DNA testing implicates an identified person.

The amendments made by the proposal would apply to the prosecution of any offense committed before, on, or after the date of the enactment of the statute if the applicable limitation period has not yet expired.

7. Relationship to Objectives and Related Provisions

This proposal would support the GC Terms of Reference and MJRG Operational Guidance by incorporating practices and procedures used in U.S. district courts with respect to the applicable statute of limitations for child abuse offenses and for DNA testing identification.

This proposal also would support MJRG Operational Guidance by addressing an ambiguity in Article 43 with respect to fraudulent enlistment offenses.

8. Legislative Proposal

SEC. 705. STATUTE OF LIMITATIONS.

(a) INCREASE IN PERIOD FOR CHILD ABUSE OFFENSES.—Subsection (b)(2)(A) of section 843 of title 10, United States Code (article 43 of the Uniform Code of Military Justice), is amended by striking "five years" and inserting "ten years".

(b) INCREASE IN PERIOD FOR FRAUDULENT ENLISTMENT OR APPOINTMENT OFFENSES.—Such section (article) is further amended by adding at the end the following new subsection:

"(h) FRAUDULENT ENLISTMENT OR APPOINTMENT.—A person charged with fraudulent enlistment or fraudulent appointment under section 904a(1) of this title (article 104a(1)) may be tried by court-martial if the sworn charges and specifications are received by an officer exercising summary court-martial jurisdiction with respect to that person, as follows:

"(1) In the case of an enlisted member, during the period of the enlistment or five years, whichever provides a longer period.

"(2) In the case of an officer, during the period of the appointment or five years, whichever provides a longer period.".

(c) DNA EVIDENCE.—Such section (article), as amended by subsection (b), is further amended by adding at the end the following new subsection:

"(i) DNA EVIDENCE.—If DNA testing implicates an identified person in the commission of an offense punishable by confinement for more than one year, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.".

(d) CONFORMING AMENDMENTS.—Such section (article) is further amended in subsection (b)(2)(B) by striking clauses (i) through (v) and inserting the following:

"(i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).

"(ii) Maiming in violation of section 928a of this title (article 128a).

"(iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).

"(iv) Kidnapping in violation of section 925 of this title (article 125).".

(e) APPLICATION.—The amendments made by subsections (a), (b), (c), and (d) shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this subsection if the applicable limitation period has not yet expired.

9. Sectional Analysis

Section 705 contains amendments to Article 43 pertaining to the statute of limitations for certain UCMJ offenses. The statute would be amended as follows:

Section 705(a) would extend the statute of limitations applicable to child abuse offenses under Article 43 from the current five years or the life of the child, whichever is longer, to ten years or the life of the child, whichever is longer, thereby aligning Article 43(b)(2)(A) with 18 U.S.C. § 3283 (Offenses against children).

Section 705(b) would create a new subsection (h), extending the statute of limitations for Article 83 (fraudulent enlistment) cases from five years, as it currently stands, to (1) the length of the enlistment, in the case of enlisted members; (2) the length of the appointment, in the case of officers; or (3) five years, whichever is longer.

Section 705(c) would create a new subsection (i), extending the statute of limitations until a period of time following the implication of an identified person by DNA testing that is equal to the otherwise applicable limitations period.

Section 705(d) contains conforming amendments based on the proposed realignment of the punitive articles.

Section 705(e) establishes the applicability of the amendments made by subsections (a), (b), (c), and (d) to the prosecution of any offense committed before, on, or after the date of the enactment of the statute if the applicable limitations period has not yet expired.

Article 44 – Former Jeopardy
10 U.S.C. § 844

1. Summary of Proposal

This proposal would amend Article 44 to more closely align the attachment of jeopardy standard with the standard applicable in federal civilian criminal proceedings. Part II of the Report will consider whether any changes are needed in the rules implementing Article 44.

2. Summary of the Current Statute

Article 44 contains three related subsections: (a) stating the general principle that "[n]o person may, without his consent, be tried a second time for the same offense"; (b) defining finality with respect to former guilty findings as being "after review of the case has been fully completed"; and (c) stating that, for the purpose of dismissals by the convening authority or "on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused," jeopardy attaches "after the introduction of evidence."

3. Historical Background

When Article 44 was originally proposed, it included the provisions that are currently under subsections (a) (no retrial for the same offense) and (b) (defining finality), but not the provision under subsection (c) (attaching jeopardy after introduction of evidence).[1] During the House Subcommittee hearings on the UCMJ in 1949, concern was raised about a recent double jeopardy case in which charges had been dismissed after evidence had already been entered.[2] Article 44(c) was added in order to protect military members against such actions.

4. Contemporary Practice

Under current rules, a panel is sworn in prior to voir dire.[3] After challenges are made and resolved and all the dismissed members have departed, the military judge will announce that the court is assembled.[4] This is often immediately followed by opening statements, and then the presentation of the evidence by the government.

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1046 (1949) [hereinafter *Hearings on H.R. 2498*].

[2] *Hearings on H.R. 2498*, supra note 1, at 1048-5 (discussing Wade v. Hunter, 69 S. Ct. 834 (1949)).

[3] R.C.M. 912(d) (Discussion).

[4] R.C.M. 911.

5. Relationship to Federal Civilian Practice

In federal civilian practice, prospective jurors swear two oaths: first, they swear to tell the truth during voir dire; then, after they are impaneled, they swear a second oath to faithfully perform their duties as a juror.[5] Jeopardy attaches following the second oath.[6] After jeopardy attaches, a case may not be retried after dismissal unless the dismissal was required due to a manifest necessity.[7] In civilian practice, manifest necessity includes mistrials, unavailable witnesses due to the fault of the accused, and other reasons out of the control of the government. In military practice, manifest necessity also includes military necessities, such as interrupting a court-martial due to military operations.[8] In short, both systems allow for a retrial after jeopardy attaches, provided there is a legitimate need for the dismissal.

The difference between military and federal civilian practice with respect to jeopardy attachment is attributable to the different bases for the rules in each system. In civilian practice, jeopardy attachment is based on case law concerning the Fifth Amendment;[9] in the military, attachment is based on statute. Attachment of jeopardy in civilian practice changed when the Supreme Court held that attachment must occur when the jury is sworn.[10] Military law has not incorporated this change. The military's deviation from the civilian standard is not necessary in order to meet the goals of military justice. Rather, it is the result of an amendment to Article 44, originally intended to bring military practice into compliance with then contemporary civilian practice,[11] which has not been updated to match current civilian law.

6. Recommendation and Justification

Recommendation 44: Amend Article 44 to more closely align double jeopardy protections in the military with those applicable in federal civilian practice.

Given that the doctrine of manifest necessity will allow retrials for cases which were dismissed due to military necessity, there does not appear to be any need for the deviation between civilian and military double jeopardy rules.

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[5] Handbook for Trial Jurors Serving in the United States District Courts, at 4-6 (Administrative Office of the United States Courts, 10 March 2015).

[6] Crist v. Bretz, 437 U.S. 28, 35 (1978).

[7] United States v. Perez, 22 U.S. 579, 580 (1824). *See also* United States v. Dixon, 913 F.2d 1305, 1310 (8th Cir. 1990) ("If manifest necessity required the declaration of a mistrial, then the defendants may be retried without violating their protection against double jeopardy.").

[8] United States v. Easton, 71 M.J. 168, 172-73 (C.A.A.F. 2012).

[9] *Crist*, 437 U.S. at 35.

[10] *Id*.

[11] *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. Of the S. Comm. On Armed Services*, 81st Cong. 168-170 (1949).

Other proposals in this Report, such as eliminating courts-martial without a military judge and using fixed panel sizes, would reduce many differences between civilian juries and military panels. Since military and civilian practice are becoming more similar, the military should follow the same rules regarding double/former jeopardy as the federal civilian courts.

7. Relationship to Objectives and Related Provisions

This proposal support the GC Terms of Reference by incorporating double jeopardy standards used in U.S. district courts.

8. Legislative Proposal

SEC. 706. FORMER JEOPARDY.

Subsection (c) of section 844 of title 10, United States Code (article 44 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) A court-martial with a military judge alone is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after introduction of evidence; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.

"(2) A court-martial with a military judge and members is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after the members, having taken an oath as members under section 842 of this title (article 42) and after completion of challenges under section 841 of this title (article 41), are impaneled; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.".

9. Sectional Analysis

Section 706 would amend Article 44 (Former jeopardy) to align the military more closely with federal civilian standards concerning double jeopardy.

Article 45 – Pleas of the Accused
10 U.S.C. § 845

1. Summary of Proposal

This proposal would amend Article 45 to: (1) to permit an accused to enter a guilty plea to a capital offense, subject to the requisite inquiry to ensure that the plea is voluntary and that the accused articulates the facts establishing the elements of the plea; (2) establish a statutory standard for assessing claims of error in the plea inquiry process; and (3) make technical conforming changes in the statute.

2. Summary of the Current Statute

Article 45(a) requires a military judge to enter a plea of not guilty in the record on behalf of an accused when an accused: (1) makes an irregular pleading; (2) fails to enter a plea; (3) enters a plea of guilty but sets forth matters inconsistent with the plea that cannot be resolved; (4) has made an improvident plea; or (5) does not understand the meaning and effect of a guilty plea. Article 45(b) prohibits an accused from pleading guilty to an offense for which the death penalty may be adjudged. Subsection (b) also permits, if authorized by regulations of the Secretary concerned and if the offense is not one for which the death penalty may be adjudged, the entry of findings of guilt upon acceptance of a plea of guilty without the necessity of voting on the findings. Under the statute, such a finding of guilt constitutes the finding of the court unless the plea is withdrawn prior to the announcement of the sentence, in which case the proceedings continue as though the accused had pleaded not guilty.

3. Historical Background

Article 45(a) generally reflected Army and Navy practice at the time of the UCMJ's enactment in 1950.[1] Article 45(b) also reflected Army and Navy practice before the enactment of the UCMJ, although there was previously no statute prohibiting guilty pleas in capital cases.[2] Article 45(b) was amended in the Military Justice Act of 1968 to permit the entry of findings of guilt upon acceptance of a plea of guilty without the necessity of voting on the findings, if authorized by regulations of the Secretary concerned, and if the offense was not one for which the death penalty could be adjudged.[3]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1053 (1949).

[2] *See id*. *See generally* Major Frank E. Kostik Jr., *If I Have to Fight for My Life—Shouldn't I Get to Choose My Own Strategy? An Argument to Overturn the Uniform Code of Military Justice's Ban on Guilty Pleas in Capital Cases*, 220 MIL. L. REV. 242, 245 (2014).

[3] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(19)(B), 82 Stat. 1335. Before this amendment, military practice required the court to vote on the findings even if an accused pleaded guilty. *See Military Justice: Joint*

4. Contemporary Practice

The President has implemented Article 45 through R.C.M. 910, which provides the rules and procedures applicable to guilty plea proceedings, including plea agreement inquiries by the military judge. Under current military practice, a plea of guilty may not be accepted unless it is made knowingly and voluntarily after the military judge has explained the elements of the offense. Furthermore, before a plea of guilty may be accepted, the accused must admit every act or omission, and element of the offense to which the accused has pled guilty, and must be pleading guilty because the accused agrees that he or she is, in fact, guilty.[4] The military judge is required to engage in a detailed colloquy with the accused in accordance with *United States v. Care*.[5] Unless it is clear from the entire record that an accused knows the elements, admits them freely, and is pleading guilty because he or she is actually guilty, the plea of guilty will not be accepted.

The current approach to appellate review of guilty pleas focuses attention on the military judge's conduct of the plea inquiry. "Rejection of a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea."[6]

5. Relationship to Federal Civilian Practice

Fed. R. Crim. P. 11 governs guilty pleas in federal civilian practice. Like Article 45(a), Rule 11 requires a federal court, before accepting a guilty plea, to determine that the defendant's decision to plead is voluntary, knowing, and intelligent.[7] Similar to R.C.M. 910, the federal rules require that a defendant understand the nature of the offense to which he or she is pleading guilty.[8] The federal rules also require a factual basis for a plea.[9] However, Fed. R. Crim. P. 11 does not require any specific on-the-record colloquy.[10]

Hearings before the Subcomm. on Constitutional Rights of the Senate Subcomm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services, 87th Cong. 543 (1966).

[4] R.C.M. 910(c)-(e).

[5] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); *see* R.C.M. 910(e) (Determining accuracy of plea); LTC Patricia A. Ham, *Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Arrangements*, 2004 ARMY LAW. 10, 32 (July 2004).

[6] United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)

[7] FED. R. CRIM. P. 11(b)(2).

[8] FED. R. CRIM. P. 11(b)(1)(G); *see* Boykin v. Alabama, 395 U.S. 238, 240 (1969).

[9] FED. R. CRIM. P. 11(b)(3).

[10] United States v. Adams, 961 F.2d 505, 511 (5th Cir. 1992) (finding that the court must subjectively satisfy itself of "an adequate factual basis.")

District court judges may also accept a guilty plea when an accused claims he is innocent, pursuant to *North Carolina v. Alford*.[11] The *Alford* plea is not permitted under longstanding military law, which requires the accused to agree that he or she is, in fact, guilty of the offense.[12]

In federal civilian practice and in all but three of the states that have the death penalty, defendants may plead guilty in a capital cases. Furthermore, federal defendants have a right to appeal their guilty pleas unless waived, but the appeal is not automatic.[13] In these cases, federal appellate courts will apply either a harmless-error or a plain-error standard of review, depending on whether the defendant made a timely objection at trial.[14] Under Fed. R. Crim. P. 11(h), like Fed. R. Crim. P. 52(a), the courts will grant no relief for errors a defendant raises by timely objection at trial that "do not affect substantial rights."[15]

With respect to appellate review of errors in the plea process not raised at trial, the Supreme Court has held that plain-error will apply when a defendant stays silent and fails to object to an error in the Rule 11 guilty plea proceedings.[16] Federal plain error doctrine

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[11] North Carolina v. Alford, 400 U.S. 25, 37-38 (1970) (holding that the defendant's express admission of guilt in the entrance of a guilty plea was not a constitutional requisite). In *Alford*, the plea was accepted despite protestations of innocence because the court found overwhelming evidence of guilt.

[12] The military's mandate to insure that pleas are voluntary, knowing, and intelligent under Article 45 and R.C.M. 910 reflects the unique challenges of ensuring voluntariness of a plea under the special circumstances of military life, including the "subtle pressures inherent to the military environment that may influence the manner in which service members exercise (and waive) their rights." United States v. Phillippe, 63 M.J. 307, 310 (C.A.A.F. 2006). *See* United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969). Members of the armed forces are subject to involuntary orders and assignments, often in locations far from family, friends and other sources of support. They are subject to prosecution under statutes that would be considered unconstitutionally vague in civilian courts. *See* Parker v. Levy, 417 U.S. 733 (1974). In contrast to civilian proceedings, where unrelated charges typically are not subject to a single trial, military policy provides for trial of all known offenses -- no matter how distinct -- at a single trial under a very narrow standard for severance of charges. *See* R.C.M. 906(b)(10) (severance may be granted only to prevent a manifest injustice). In light of those circumstances, the military justice system has counterbalanced the pressures of military life by ensuring that the record of trial demonstrates a clear acknowledgement of guilt based upon an understanding element and an articulation by the accused of the facts establishing each element. These standards diminish the potential for wrongful convictions, while also providing a well-developed record that can prove highly useful in sustaining convictions based upon a properly conducted proceeding.

[13] *See* United States v. Seay, 620 F.3d 919, 921 (8th Cir. 2010) ("It is a well-established legal principle that a valid plea of guilty is an admission of guilt that waives all non-jurisdictional defects and defenses."); United States v. Moussaoui, 591 F.3d 263, 279 (4th Cir. 2010) ("When a defendant pleads guilty, he waives all non-jurisdictional defects in the proceedings conducted prior to entry of the plea [and] has no non-jurisdictional ground upon which to attack that judgment except the inadequacy of the plea."); *see also* Eric Hawkins, *A Murky Doctrine Gets A Little Pushback: The Fourth Circuit's Rebuff of Guilty Pleas in United States v. Fisher*, 55 B.C. L. REV. E-Supplement 103, 114 (2014).

[14] United States v. Vonn, 535 U.S. 55, 58, (2002).

[15] Rule 11(h) states, "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." Rule 52(a) states "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[16] *Vonn*, 535 U.S. at 59.

allows an appellate court to correct an error not raised at trial only when the appellant demonstrates that: (1) there is error; (2) the error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.[17] In *United States v. Dominguez Benitez*, the Supreme Court further refined the plain error test in a guilty plea case.[18] The Court said that relief for Rule 11 error must be tied to prejudicial effect. In order to demonstrate that an error affected substantial rights, the error must have had a prejudicial effect on the outcome of a judicial proceeding. The Court held that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the . . . court committed plain error under Rule 11 . . . must show a reasonable probability that, but for the error, he would not have entered the guilty plea."[19]

Finally, unlike in the military, a federal defendant may waive the right to appeal as part of a plea agreement, if that waiver is knowing and intelligent,[20] although the waiver may not include ineffective assistance of counsel claims. A district court, before accepting a guilty plea, must "inform the defendant of, and determine that the defendant understands . . . any . . . provision waiving the right to appeal."[21] However, the court accepting the plea is not required to conduct a specific dialogue with the defendant concerning the waiver of his right to appeal, so long as the record contains sufficient evidence to determine that the defendant knowingly and voluntarily waived that right.

6. Recommendation and Justification

Recommendation 45.1: Amend Article 45(b) to permit an accused to plead guilty in capital cases where death is not mandatory.

Permitting an accused to enter a plea of guilty in a capital case where the death sentence is not mandatory is consistent with civilian criminal practice. The reasons for the prohibition on guilty pleas in capital cases are no longer applicable in light of statutory and constitutional requirements for a knowing and voluntary plea, the assistance of counsel, and the detailed inquiry into voluntariness and the circumstances of the offense under Article 45 and R.C.M. 910.

A guilty plea is recognized as a matter in mitigation. A plea in a capital case may allow an accused to avoid imposition of the death penalty by demonstrating that he has taken

[17] United States v. Marcus, 560 U.S. 258, 262 (2010).

[18] United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004).

[19] *Id.* at 83.

[20] FED. R. CRIM. P. 11(b)(1)(N). *See* United States v. Feichtinger, 105 F.3d 1188, 1190 (7th Cir. 1997), *cert. denied*, 520 U.S. 1281 (1997) ("The right to appeal is a statutory right, and like other rights – even constitutional rights – which a defendant may waive, it can be waived in a plea agreement."); *In re* Sealed Case, 702 F.3d 59, 63 (D.C. Cir. 2012) ("A waiver of the right to appeal a sentence is presumptively valid and is enforceable if the defendant's decision to waive is knowing, intelligent, and voluntary.").

[21] FED. R. CRIM. P. 11(b)(1)(N).

responsibility for his conduct, is remorseful, and is seeking to spare the victim's family and the court system unnecessary time and expense. The Supreme Court has recognized that an individual accused of a capital charge has an interest in pleading guilty and avoiding trial "in order to spare themselves and their families the spectacle and expense of protracted courtroom proceedings."

Recommendation 45.2: Amend Article 45(b) to delete reference to a court-martial without a military judge.

Based on a separate proposal to eliminate special courts-martial without a military judge, reference to such a court-martial in subsection (b) should be deleted.

Recommendation 45.3: Amend Article 45(b) to eliminate the need for separate service regulations authorizing entry of findings upon acceptance of a guilty plea.

Prior to the enactment of the UCMJ, a finding of guilty could not be entered without a vote even if the plea had been accepted. The drafters of the Code permitted the services to authorize entry of a finding of guilty without a vote after acceptance of such a plea. Each of the services authorizes this practice through service regulations. Entry of a finding of guilty after acceptance of a plea is the norm in military justice practice. Requiring the services to separately authorize such a practice is unnecessary.

Recommendation 45.4: Amend Article 45 to include a new subsection (c) that would codify harmless error review in guilty plea cases.

This proposal is modeled after Fed. R. Crim. P. 11(h) with language that conforms to Article 59(a). Subsection (c) would make clear that deviations from Article 45(a) are subject to harmless error review. The proposal is an acknowledgement that not every violation of Article 45 requires invalidation of the guilty plea. The military providence inquiry has developed over the years into a careful, deliberate procedure with comprehensive protections to ensure that every guilty plea is knowing and voluntary. A guilty plea of that character should not be overturned for minor or technical violations of Article 45(a) that amount to harmless error.

7. Relationship to Objectives and Related Provisions

The recommendation to eliminate the reference to a court-martial without a military judge is related to proposed changes to Articles 16, 19, 26, 40, 41, 49, 50a and 51 to delete similar references.

The recommendation to codify a harmless error review in guilty plea cases is related to proposed changes in appellate review under Article 66(c) which are designed to focus appellate review more precisely on claims of prejudicial error at trial. In that regard, Part II of the Report will recommend related changes to the Manual for Courts-Martial to apply plain error review for matters not properly preserved at trial. Specifically, Part II of the Report will consider the potential of applying a rule for plain error, similar to Fed. R. Crim. P. 52(b), as well as a modification to R.C.M. 910(j) to apply plain error review to Article 45(a) matters raised for the first time on appeal. The goal would be to require an accused

to identify errors in the guilty plea process and bring them to the attention of the trial judge to correct, or face plain-error review on appeal.

8. Legislative Proposal

SEC. 707. PLEAS OF THE ACCUSED.

(a) PLEAS OF GUILTY.—Subsection (b) of section 845 of title 10, United States Code (article 45 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking "may be adjudged" and inserting "is mandatory"; and

(2) in the second sentence—

(A) by striking "or by a court-martial without a military judge"; and

(B) by striking ", if permitted by regulations of the Secretary concerned,".

(b) HARMLESS ERROR.—Such section (article) is further amended by adding at the end the following new subsection:

"(c) HARMLESS ERROR.—A variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused.".

9. Sectional Analysis

Section 707 contains amendments to Article 45 concerning the pleas of the accused.

Section 707(a) would amend Article 45(b) to permit an accused to plead guilty in a capital case when the death penalty is not a mandatorily prescribed punishment. It would further amend the statute to conform to the proposed changes in Articles 16 and 19 to require a military judge to be detailed to all general and special courts-martial, and to eliminate the unnecessary requirement under current law for members to enter a finding of guilty where the military judge has already accepted the accused's guilty plea.

Section 707(b) would codify a harmless error rule in a new subsection (c) of Article 45. The proposed language is adapted from Fed. R. Crim. P. 11(h), using the language of Article 59(a) by substituting the phrase "materially prejudice the substantial rights of the accused" for the phrase "affects" substantial rights. *See* Article 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."); *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (describing Article 59(a) as the military counterpart to Fed. R. Crim. P. 52(a)). These changes would reflect federal practice and procedure with respect to harmless error and plain error review, while recognizing the unique aspects of military practice.

The proposed amendments to Article 45 aim to improve the efficiency and effectiveness of appellate review of unconditional guilty pleas, while also preserving the unique procedural protections in the military system to ensure a guilty plea is voluntary, knowing, and intelligent. The amendments fit within the larger goal of encouraging error correction at the trial stage and would make no change to the responsibilities of the military judge under Article 45(a). The changes seek to eliminate the sanction of reversal for harmless errors, and would conform the statute to the proposed changes in Article 66 (replacing automatic review in non-capital cases with review based upon the accused's right to file an appeal). Subsection (c) addresses only harmless error. Implementing rules will prescribe plain error review for matters not properly preserved at trial. The addition of subsection (c) reflects the specific structure of Article 45, and is not intended to disturb the longstanding application of standards of review, including a harmless error test, to other aspects of the Code that are not accompanied by a statutory standard of review.

Articles 46-47 – Opportunity to Obtain Witnesses and Other Evidence & Refusal to Appear or Testify

10 U.S.C. §§ 846-47

1. Summary of Proposal

This proposal would amend Articles 46 and 47 to clarify the authority to issue and enforce subpoenas for witnesses and other evidence, and to enhance the government's ability to use investigative subpoenas prior to trial, consistent with federal and state practice. In addition, the proposed amendments to Article 46 would provide explicit authority for military judges to modify, quash, or order compliance with subpoenas before and after referral of charges, and to issue warrants and orders for the production of stored electronic communications, consistent with federal and state practice under the Stored Communications Act. This proposal would further amend Article 46 by moving the provisions under subsection (b) concerning defense counsel interviews of victims of sex-related offenses to Article 6b and extending those provisions to victims of all offenses, consistent with related victims' rights provisions.

2. Summary of the Current Statutes

Article 46 addresses the production of witnesses and evidence, including the issuance of subpoenas. Under Article 46(a), the trial counsel, defense counsel, and the court-martial are guaranteed "equal opportunity" to obtain witnesses and other evidence. Article 46(b) places two conditions on the defense counsel's ability to interview "alleged victims of alleged sex-related offenses": (1) when the government notifies the defense of its intent to call such victims as witnesses at a preliminary hearing or a court-martial, the defense must make any requests for interviews of the alleged victims through the Special Victims' Counsel or other victim's counsel, if applicable; and (2) such interviews shall, if requested by the alleged victim, take place only in the presence of counsel for the Government, counsel for the victim, or a Sexual Assault Victim Advocate. Article 46(c) provides statutory authority for the use of subpoenas to obtain witnesses and evidence for courts-martial, stating that "[p]rocess issued in court-martial cases . . . shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States or the Commonwealths and possessions."

Article 47 assists in the enforcement of military subpoenas with respect to civilian witnesses and evidence custodians, by making it a punishable offense—triable in U.S. district court upon certification of facts to the U.S. Attorney—for any person to willfully neglect or refuse to comply with process issued under Article 46, including duly issued subpoenas duces tecum (subpoenas for evidence) to obtain documentary evidence for use at Article 32 preliminary hearings.

3. Historical Background

As early as 1891, the ability to issue enforceable, nationwide process to obtain witnesses and other evidence for court-martial proceedings was recognized as essential to the legitimacy and effective administration of the nation's military justice system.[1] In 1901, Congress passed "an act to prevent the failure of military justice and for other purposes," the central feature of which was to make it a misdemeanor offense for any "person not belonging to the army of the United States" to willfully neglect or refuse to appear as a witness at, or produce documentary evidence for, a general court-martial.[2] When Congress enacted the UCMJ in 1950,[3] it sought to replicate the rules for federal compulsory process in Articles 46 and 47,[4] which it derived in part from Articles 22 and 23 of the Articles of War.[5] With respect to Article 46's subpoena power provision (now codified as subsection (c)), the drafters of the UCMJ "felt [it] appropriate to leave the mechanical details as to the issuance of process to regulation."[6] The drafters added the first sentence of Article 46 concerning "equal opportunity" (now codified as subsection (a)) in order "to insure equality between the parties in securing witnesses."[7] Both articles remained substantially unchanged from their original versions until recently.

In 2011, the Department of Defense proposed several amendments to Article 47 in order to address the lack of investigative subpoena power in military practice.[8] Previously, the

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[1] *See* 1891 MCM 146, n.1 (Op. Act'g Judge Adv. Genl., June 26, 1891) ("I am of the opinion that the courts would hold that [the current military subpoena process] does not, under the law, run beyond the State, Territory or District where the military court sits. It is certain that if you should succeed in getting a witness before the court-martial by virtue of such process, you could not compel him to testify or punish him for contempt. It is a very defective piece of machinery.").

[2] 31 Stat. 950 (March 2, 1901); *see* United States v. Praeger, 149 F. 474 (W.D. Texas 1907). This punishment provision was later codified as Article of War 23, the predecessor of Article 47 of the UCMJ.

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] Maj. Joseph Topinka, *Expanding Subpoena Power in the Military*, 2003 ARMY LAW. 15, 19-20 (citing Brief for the Dept. of the Army at A1, United States v. Bennett, 12 M.J. 463 (C.M.A. 1982)).

[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1057-59 (1949) [hereinafter *Hearings on H.R. 2498*]. Unlike the current Article 46(c), which simply requires process issued in court-martial cases to "be similar" to process issued in U.S. district court, the Articles of War expressly provided such authority: "Every trial judge advocate of a general or special court-martial and every summary court-martial *shall have* power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue . . . ." AW 22 of 1920 (emphasis added). Similarly, the Articles for the Government of the Navy provided that "[a] naval court-martial or court of inquiry *shall have* power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or District where such naval court shall be ordered to sit may lawfully issue." AGN 42 of 1930 (emphasis added).

[6] *Hearings on H.R. 2498*, *supra* note 5, at 1057.

[7] *Id.*

[8] Office of Legislative Counsel, U.S. Dep't of Def., Sixth Package of Legislative Proposals Sent to Congress for Inclusion in the National Defense Authorization Act for Fiscal Year 2012 § 532 (2011) [hereinafter OLC Leg.

power to compel witness testimony and the production of documentary evidence by subpoena under the Code was limited to depositions, courts of inquiry, and courts-martial after referral of charges for trial.[9] This lack of pre-referral subpoena power created a paradox for commanders and convening authorities, in whom the UCMJ vests responsibility for investigating and disposing of alleged offenses and preferred charges and specifications: they could not refer charges for trial until there was probable cause to believe an accused committed the offense; but in order to subpoena the evidence that could help inform this probable cause determination, they first had to refer charges to a court-martial. By contrast, the vast majority of federal subpoenas are issued pre-indictment, pursuant to grand jury investigations and in support of the prosecution's efforts to develop the evidence upon which to charge the accused.[10] For decades, the military's "subpoena paradox" was widely understood to be a weakness of the military justice system and an area in need of reform.[11]

In its 2012 amendments to the UCMJ, Congress responded to the Department of Defense's legislative proposals by extending Article 47's punishment authority to cover persons not subject to the UCMJ who receive subpoenas duces tecum for Article 32 investigations, and by authorizing the convening authority in these cases to certify cases of non-compliance to the U.S. attorney for prosecution in U.S. district court.[12] With these changes, government counsel in courts-martial and Article 32 investigations now had an enforceable, pre-referral subpoena authority somewhat analogous to the authority of federal prosecutors to issue pre-indictment subpoenas pursuant to grand jury investigations.[13] Two years later,

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Proposal]. *See generally* Maj. Chris Pehrson, *The Subpoena Duces Tecum and the Article 32 Investigation: A Military Practitioner's Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process*, 2014 ARMY LAW. 8.

[9] Article 46(c) (referring explicitly to "court-martial cases"); R.C.M. 703(e)(2)(C); *see also* Flowers v. First Hawaiian Bank, 295 F.3d. 966 (9th Cir. 2002).

[10] Topinka, *supra* note 4, at 20-21.

[11] *See generally* Topinka, *supra* note 4; *see also* NATIONAL ACADEMY OF PUBLIC ADMINISTRATORS, ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 20, 23 (June 1999); OFFICE OF THE INSPECTOR GEN. U.S. DEP'T OF DEF., CRIMINAL INVESTIGATIONS POLICY AND OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 2-10 (2001).

[12] NDAA FY 2012, Pub. L. No. 112-81, § 542(a)(1)-(2) (2011).

[13] *Cf.* FED. R. CRIM. P. 17. *See generally* Topinka, *supra* note 4. Under the Department of Defense's original 2011 legislative proposal, the trial counsel's subpoena duces tecum authority would have been tied to "investigations" more generally, not solely investigations under Article 32; however, concern over "how recipients could challenge a pre-referral subpoena led Congress to limit the authority to Article 32 investigations, where the convening authority would have cognizance over the case and the power to quash or modify the subpoena." Pehrson, *supra* note 8, at 10; *see* OLC Leg. Proposal, *supra* note 8 (proposing that Article 47(a)(1) be amended to state, "Any person not subject to this chapter who . . . has been duly issued a subpoena duces tecum *for an investigation, including an investigation* pursuant to section 832(b) of this title (article 32(b)) . . ") (emphasis added); *see also* R.C.M. 703(e)(2)(F) (2012) ("If a person subpoenaed requests relief on the grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.").

Congress amended Article 47 again, this time in order to align the statute with the NDAA FY 2014 amendments that transformed the Article 32 investigation into a more narrowly focused "preliminary hearing." As amended, the purpose of the Article 32 hearing is no longer to conduct "a thorough and impartial investigation of all the matters set forth" in the charges and specifications, as it was previously. As a consequence of this transformation, the investigative value of subpoenas duces tecum issued under Articles 46 and 47 was indirectly diminished.

As part of the NDAA FY 2014 amendments, Congress also amended Article 46, splitting the statute into subsections and adding a new subsection (b). The new provision placed conditions on a defense counsel's ability to interview alleged victims of sex-related offenses. The contours of this provision have not been interpreted in the Manual or in appellate decisions. Although the legislative history does not expressly address this provision, it appears to reflect two well-settled principles of law and professional ethics: (1) that a lawyer may not communicate directly with a person the lawyer knows to be represented by counsel without the consent of that counsel or a court order;[14] and (2) that "neither the accused, his counsel, nor the court may be able to compel a witness to submit to a private interview, or not to attach such conditions to the matter as he, the witness, deems appropriate."[15] In 2015, Congress made technical amendments to Article 46(a) and (b), changing the terms "trial counsel" and "defense counsel" wherever they appeared to "counsel for the Government" and "counsel for the accused," respectively.

4. Contemporary Practice

The President has addressed Articles 46 and 47 through R.C.M. 701 (Discovery) and R.C.M. 703 (Production of witnesses and evidence), which primarily address post-referral rules of procedure. R.C.M. 405, a related provision concerning production of witnesses and evidence for a proceeding under Article 32, was recently amended to conform to the recent transformation of the Article 32 proceeding from an investigation to a preliminary hearing.[16] During the pretrial and trial stages of court-martial proceedings, these rules guide the parties with respect to disclosure of evidence and names of witnesses; access to witnesses and evidence and regulation of discovery; the parties' rights to production of witnesses and evidence; the rules and procedures applicable to Article 32 hearings; and the procedures for issuing, challenging, and enforcing subpoenas for witnesses and evidence.

Under R.C.M. 703, each party is entitled to the production of any witness whose testimony on a matter in issue would be relevant and necessary; similarly, each party is entitled to the production of evidence that is relevant and necessary.[17] Because the convening authority

[14] *See, e.g.*, ABA RULE OF PROFESSIONAL CONDUCT 4.2.

[15] United States v. Enloe, 35 C.M.R. 228, 235 (C.M.A. 1965); *accord* United States v. Alston, 33 M.J. 370, 373 (C.M.A. 1991).

[16] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[17] R.C.M. 703(b)(1) and (f)(1).

generally funds all court-martial costs, including witness expenses, the rules require the defense to submit its witness and evidence requests to the convening authority via the trial counsel and staff judge advocate.[18] Based on the "relevant and necessary" standard, the trial counsel normally determines "whether to grant or deny defense witness requests, other than expert witness requests which require the convening authority's personal decision."[19] Under current law, "[I]f the convening authority denies the request, the defense counsel must wait until the case is referred to submit the request to the military judge" for review of the convening authority's decision.[20]

When civilian witnesses and evidence not under the control of the government are determined to be relevant and necessary to a matter at issue in the case, the trial counsel issues subpoenas using the standard DD Form 453.[21] Subpoenas for live witness testimony (subpoenas ad testificandum) compel the civilian recipient—under penalty of federal prosecution—to attend and give testimony at a court-martial, court of inquiry, or deposition. These witness subpoenas are not authorized for Article 32 hearings, and generally are not issued until after referral of charges and specifications for trial (subpoenas for pre-referral depositions under Article 49 and R.C.M. 702 being the exception to this general rule).[22] Subpoenas for the production of evidence (subpoenas duces tecum) compel the recipient to produce the "books, papers, documents, data, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties."[23] When civilian recipients wish to

[18] R.C.M. 703(c)(2).

[19] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49-50 (June 2014).

[20] *Id*.

[21] MCM, App. 7. This form has been in use since May 2000, has not been updated to incorporate recent amendments to Article 47 authorizing pre-referral subpoenas duces tecum. *See* Pehrson, *supra* note 8, at 13 ("[DD Form 453] does not reflect the new power of the Article 32 to issue process, nor does it account for . . . the nuances particular to the Art. 32 subpoena. For instance, [it] commands a person 'to testify as a witness' and to bring specified evidence 'with them' to the proceeding. This language contradicts R.C.M. 703(f)(4)(B), which permits a person to comply with the Article 32 subpoena without having to personally appear.").

[22] R.C.M. 703(e)(2)(C).

[23] Exec. Order No. 13,669, 79 FED. REG. 34,999, 35,002 (Jun. 18, 2014) (R.C.M. 703(e)(2)(B), as amended). The rules and procedures pertaining to pre-referral subpoenas duces tecum have been in a state of flux due to the multiple amendments to Article 47(a)(1) over the past three years. On June 13, 2014, the President issued Executive Order (EO) 13669, modifying various sections of R.C.M. 703 and R.C.M. 405 to implement the 2012 amendments that created the initial authority for issuance of subpoenas duces tecum for "investigation[s] pursuant to" Article 32. Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,000-35,005 (Jun. 18, 2014). Under the revised rules, following the convening authority's order directing an Article 32 investigation, the Article 32 investigating officer makes an initial determination of whether documentary evidence requested by the parties is relevant to the investigation and non-cumulative. *Id.* at 35,000-35,001, 35,004-35,005 (describing amended R.C.M. 405(g) and R.C.M. 703(f)(4)(B)). If that determination is positive, the trial counsel or the investigating officer is authorized to issue a subpoena duces tecum to attempt to obtain the relevant evidence. *Id.* On June 17, 2015, the President signed Executive Order 13,696, implementing new changes to R.C.M. 405 and 703. Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015). Under the recent revisions, only "counsel for the Government" would be authorized to issue subpoenas duces tecum to obtain evidence for

challenge military subpoenas on the grounds that the demands for testimony or evidence contained therein are "unreasonable or oppressive" (the applicable federal civilian standard), they are authorized to submit requests that the subpoena be modified or withdrawn ("quashed").[24] Under current law, when subpoenas are issued after referral of charges and specifications for trial, such requests are received and acted upon by the military judge detailed to the court-martial; before referral of charges and specifications—including for any Article 32 subpoena duces tecum—the convening authority is responsible for acting upon these requests.[25] If the appropriate authority determines that the subpoenas are not unreasonable or oppressive, then warrants of attachment (DD Form 454) may be issued to compel the appearance of the witness or the production of documents.[26]

Subpoenas issued pursuant to Articles 46 and 47 and the procedures provided in R.C.M. 703 have been described as "judicial subpoenas"—roughly equivalent to subpoenas issued under Fed. R. Crim. P. 17 in U.S. district court.[27] Under current law, however, military criminal investigative organizations and military trial counsel are unable to utilize the subpoena authority to order production of relevant evidence from electronic communications service providers—including cell phone records, emails, and text messages. This is because such information is protected by the Stored Communications Act,[28] a federal privacy-protection law, and military courts are not defined as "courts of competent jurisdiction" under the law's definitions section.[29] Furthermore, military judges do not currently have the authority to issue "warrants," which are required for most types

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Article 32 preliminary hearings. The standard for determining whether a subpoena duces tecum should issue would be: (1) "whether the evidence [sought] is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing"; and (2) whether issuance of the subpoena duces tecum would "cause undue delay to the preliminary hearing."

[24] R.C.M. 703(e)(2)(F). *Cf.* FED. R. CRIM. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.").

[25] R.C.M. 703(e)(2)(F).

[26] R.C.M. 703(e)(2)(G). *See generally* United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

[27] United States v. Curtin, 44 M.J. 439 (C.M.A. 1996); *see id.* at 441 (finding that the trial counsel's subpoena authority in "the military justice system parallels the functions of the clerk of court of the United States District Court who issues subpoenas for that court as a ministerial act.").

[28] 18 U.S.C. §§ 2701-2712 (2006).

[29] 18 U.S.C. § 2711. *See generally* Lt Col Thomas Dukes, Jr. & Lt Col Albert C. Rees, Jr., *Military Criminal Investigations and the Stored Communications Act*, 64 A.F. L. REV. 103 (2009). As noted by Dukes and Rees, under the Stored Communications Act, authorities may seek disclosure of certain classes of protected data with notice to the subscriber and a subpoena or a court order. 10 U.S.C. § 2703(b)(1)(B). However, in *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010), the Sixth Circuit held such procedures to be unconstitutional. Several providers, including Google and Yahoo!, have cited the Sixth Circuit's position and refused to provide any class of stored electronic communications without a search warrant issued by a "court of competent jurisdiction" under Section 2711 of the Act. Major Sam C. Kidd, *Military Courts Declared Incompetent: What Practitioners (Including Defense Counsel) Need to Know About the Stored Communcations Act*, 40 No. 3 THE REP. 17, 21 (2013).

of information protected under the Act. As a result, only the most basic account data and account holder information are generally obtainable for use in military investigations.

One alternative to obtaining relevant electronic communications for investigative purposes is to request an administrative subpoena issued under the authority of the DoD Inspector General.[30] These administrative subpoenas traditionally were limited to Department investigations concerning fraud, waste, and abuse, but in 2009, the program was expanded to include "support of certain DoD non-fraud related [general crimes] investigations."[31] Under the expanded mandate, the Inspector General's Office may exercise its administrative subpoena power in support of general crimes investigations when there is a "sufficient DoD nexus to the crime at issue," and when "the particular crime at issue is of such a nature and/or such concern to DoD as to warrant the DoD IG's involvement in the investigation."[32] Under this "Particular Crimes Test," one of twenty listed offenses—including sexual assault, murder, espionage, drug trafficking, and other serious offenses under the UCMJ—must be alleged in order for the Inspector General's Office to issue an administrative subpoena in support of a general crimes investigation.[33] Although these administrative subpoenas have certain advantages over subpoenas issued under Articles 46 and 47,[34] generally they are viewed as an inadequate alternative, due both to the limited scope of offenses for which they are available and their lengthy administrative requirements.[35] A second alternative, often equally if not more difficult as a practical matter, is for the trial counsel and the military criminal investigative organization to request subpoena assistance from U.S. Attorney offices, state prosecutors, and local law enforcement. Generally, these agencies are fully occupied in the prosecution of federal and state crimes and find it difficult to provide additional support for military investigations and prosecutions.

5. Relationship to Federal Civilian Practice

In federal civilian practice, discovery rules and procedures are provided under Fed. R. Crim. P. 16, and subpoena procedures are provided under Fed. R. Crim. P. 17. Although federal

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[30] *See generally* Dep't of Defense Inspector General's Office Subpoena Program website, *at* http://www.dodig.mil/programs/subpoena/index.html.

[31] Dep't of Defense Inspector General, Memorandum for Director, Defense Criminal Investigative Service, Jun. 16, 2009. *See generally* Maj. Stephen Nypaver III, *Department of Defense Inspector General Subpoena*, 1989 ARMY LAW. 17.

[32] Dep't of Defense Inspector General Subpoena Reference Guide 35-36 (Aug. 2009).

[33] *Id*.

[34] *See* Dep't of Defense Inspector General Subpoena Reference Guide 6 (Aug. 2009).

[35] *See* Dukes & Rees, *supra* note 29, at 120 (noting that most offenses that are prosecuted at special courts-martial do not qualify under the DoD IG's "particular crimes" test); *see also* Topinka, *supra* note 4, at 22 (describing the lengthy documentary requirements for DoD IG subpoenas and noting that many investigators "who must also follow their own regulations, believe . . . MCIO regulations and the IG documentary requirements are too lengthy, cumbersome, and difficult to handle").

discovery rules are similar to military discovery rules in many ways, in terms of practice, discovery in military cases has traditionally been much broader than the discovery provided for in federal district court cases.[36] In part, this difference between military and federal civilian discovery practice can be attributed to tradition and custom, and the orientation in the military justice system toward "open-file" disclosure policies that are not as common in federal prosecution offices.

With respect to subpoena practice, despite the similarities between military subpoenas and subpoenas issued under Fed. R. Crim. P. 17,[37] federal prosecutors and law enforcement agencies have much broader authority to utilize subpoenas during the investigative, pre-indictment (pre-referral) stages of a case.[38] Under Fed. R. Crim. P. 6 and 17, federal prosecutors have access to grand jury investigative subpoenas as soon as a grand jury is summoned, which often happens before the accused is even aware of the investigation or afforded the right to counsel. Similarly, in many states, prosecutors are given investigative subpoena authority by statute, to be exercised in advance of filing charges with the court or obtaining an indictment.[39] In the military justice system, by contrast, an accused is provided with a defense counsel as soon as charges are preferred—generally weeks before an Article 32 hearing or before referral of charges and specifications to general or special courts-martial for trial. Furthermore, whereas probable cause is not required for the issuance of grand jury subpoenas,[40] the vast majority of military subpoenas are issued post-referral, after the probable cause threshold has already been met. This difference provides federal prosecutors with a superior investigative tool during the preliminary, investigative stages of a case.[41] In addition, federal prosecutors and law enforcement agencies have several available means for obtaining electronic communications and other stored data protected by the Stored Communications Act, including—depending on the classification level of the information sought—grand jury investigative subpoenas, trial subpoenas, and search warrants and court orders issued by district court judges.[42]

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[36] *See* United States v. Kinney, 56 M.J. 156 (C.A.A.F. 2001) ("One of the hallmarks of the military justice system is that it provides an accused with a broader right of discovery than required by the Constitution . . . or otherwise available to federal defendants in civilian trials under Fed. R. Crim. P. 12 and 16."); United States v. Killebrew, 9 M.J. 154, 159 (C.M.A. 1980); United States v. Simmons, 38 M.J. 376 (C.M.A. 1993).

[37] *See* United States v. Curtin, 44 M.J. 439, 441 (C.M.A. 1996) (the trial counsel's subpoena authority in "the military justice system parallels the functions of the clerk of court of the United States District Court who issues subpoenas for that court as a ministerial act.").

[38] Topinka, *supra* note 4, at 20-21.

[39] *See generally* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 8.3(c) (Subpoena duces tecum) and § 8.1(c) (Alternative procedures) (3d ed. 2013); *see also* Oman v. State, 737 N.E.2d 1131, 1136 (Ind. 2000); United States v. Santucci, 674 F.2d 624, 627, 632 (7th Cir.1982).

[40] *See* United States v. Williams, 504 U.S. 36, 48 (1992).

[41] *See* Topinka, *supra* note 4, at 21.

[42] *But see* note 29, *supra*, concerning the *Warshak* decision and the requirement for a search warrant regardless of the classification level of the information sought.

Another difference between military practice and federal civilian practice in this area is the new Article 46(b), the provision placing statutory conditions on the defense counsel's ability to interview victims of sex-related offenses. There is no federal equivalent for this provision; however, some states have created constitutional, statutory, and regulatory protections for crime victims—generally tied to other Crime Victim's Rights Act-like protections—formalizing the right of victims to refuse interviews with defense attorneys or to place reasonable conditions on the conduct of such interviews. For example, under the California Constitution, "In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to . . . [the right] to refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents."[43]

6. Recommendation and Justification

Recommendation 46.1: Amend Articles 46 and 47 to clarify the authority to issue and enforce subpoenas for witnesses and other evidence, to allow subpoenas duces tecum to be issued for "investigations of offenses under" the UCMJ when authorized by a general court-martial convening authority, and to authorize military judges to issue warrants and orders for the production of stored electronic communications under the Stored Communications Act.

This proposal would restructure Articles 46 and 47 to clarify and enhance the relationship between the two statutes. It also would enhance the government's ability to issue investigative subpoenas prior to trial, consistent with federal and state practice. These changes would provide military trial counsel with similar subpoena authority to grand jury investigative subpoenas issued by federal prosecutors in federal district court, and the investigative subpoena authority granted to prosecutors and attorneys general by statute in many state jurisdictions.

The proposed amendments are similar to the amendments to Article 47 proposed by the Department of Defense in 2011. There are two key differences between the two proposals:

First, this proposal would amend Article 46, which is the statutory authority under the UCMJ for the issuance of process, rather than Article 47, which is a punishment provision only. Because the authority "to compel the production of other evidence" under Article

[43] CAL. CONST. art. 1 Sect. 28(b)(5). The manner in which such provisions are implemented may raise due process issues with respect to the rights of an accused. *See* State v. Murtagh, 169 P.3d 602, 615, 624 (Alaska 2007) (holding that the accused's rights under the Alaska state constitution to "reasonable access to witnesses without unjustified state interference" were violated by certain provisions in the state's victims' rights, which provided that: (1) defense counsel in sexual offense cases must obtain written consent from a witness or victim before interviewing them; (2) defense representatives must advise all victims and witnesses that they did not have to talk to them and could have a prosecuting attorney or other person present during the interview; (3) defense representatives in sexual offense cases are prohibited from contacting a witness who provided written notice that they did not wish to be contacted; and (4) defense representatives must obtain consent of a victim or witness prior to recording an interview). Part II of this Report will propose implementing rules consistent with the right to due process.

46(c) is limited to "court-martial cases," it is necessary to extend this authority to include "investigations of alleged offenses under this chapter" as well.[44]

Second, this proposal would condition the issuance of pre-referral subpoenas duces tecum on the approval of a general court-martial convening authority. This requirement would provide an administrative check on this pre-referral authority, and is consistent with the convening authority's law enforcement role in the investigative stages of a potential court-martial.

These changes would result in more well-developed military criminal investigations before the ultimate charging decision by the convening authority, as well as enhanced cooperation between military criminal investigative organizations and military prosecutors during the investigative stages of a court-martial.

This proposal would clarify the provisions governing the opportunity to obtain witnesses and other evidence in cases referred to trial by court-martial. This proposal also would make technical changes to Article 46 to clarify the relationship between Articles 46, 47, and 49 with respect to subpoenas for witnesses and other evidence for courts-martial, military commissions, courts of inquiry, and depositions. Currently, Article 47 references each of these proceedings; Article 46, on the other hand, refers only to "court-martial cases," while Article 49 authorizes the ordering of depositions for use at courts-martial as well as at Article 32 preliminary hearings.

This proposal would create two related judicial authorities. First, it would authorize military judges to review requests from civilian subpoena recipients to modify or quash subpoenas for testimony and production of evidence, both before and after referral of charges. Currently, R.C.M. 703 authorizes military judges to perform this function only after charges are referred to court-martial; before charges are referred, subpoena recipients must petition the convening authority for relief.

This change would ensure that subpoenas issued to civilian witnesses and evidence custodians are reviewed, modified, and enforced by trained judicial officers at all stages of the court-martial process, consistent with the procedures and standards of review applicable in federal district court. Part II of the Report will address these standards in the rules implementing Articles 46 and 47.

In the context of pre-referral requests for depositions of crime victims, the proposed amendment would ensure that any subpoena issued to compel a victim to provide a deposition would be reviewed by a military judge, as opposed to the convening authority who ordered the deposition.

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[44] *See* Topinka, *supra* note 4, at 21 ("There is no trial counsel or court-martial . . . until a convening authority has referred a case to trial and counsel is detailed to the court-martial. By implication, there is no trial counsel subpoena authority in a military case until after referral of the charges."); LCDR James Warns, *Obtaining of Witnesses*, JAG JOURNAL 5 (1951) ("In order for this penalty language [in Article 47] to have any application, authority must exist to issue the process compelling the production of documentary evidence.").

Second, this proposal also would authorize military judges to issue warrants and court orders for the production of stored electronic communications, consistent with federal and state practice under the Stored Communications Act. This amendment would better align military practice with federal civilian practice with respect to the ability to obtain protected electronic communications during the investigative and trial stages of a court-martial proceeding. In many criminal investigations, this type of information is critical to successful law enforcement and criminal prosecutions. The UCMJ's current lack of authority to obtain this information without assistance of federal and state prosecutors inhibits law enforcement efforts and impacts the military's ability to investigate and prosecute offenders.

This proposal would include conforming amendments to the Stored Communications Act, Chapter 121 of Title 18, United States Code.

Although this is an area of federal law that is currently in flux, with various appellate court decisions making proper application of the Stored Communications Act uncertain, these amendments would ensure that military criminal investigations and courts-martial have the same access provided to state and federal investigators and courts with respect to this type of highly relevant information.

Recommendation 46.2: Amend Article 46 by moving the provisions under subsection (b) concerning defense counsel interviews of victims of sex-related offenses to Article 6b and extending those provisions to victims of all offenses, consistent with related victims' rights provisions.

The proposed amendments would extend recent protections provided to victims of sex-related offenses to all victims, consistent with the purpose and function of Article 6b and other victims' rights provisions that apply equally to all victims of offenses under the UCMJ.

Part II of the Report will address implementing rules, including R.C.M. 701, 702, and 703, and will specifically address the opportunity for expanded defense access to subpoenas during the pretrial and trial stages of courts-martial, consistent with federal civilian practice.

7. Relationship to Objectives and Related Provisions

This proposal would support the MJRG Terms of Reference by better aligning military practice with respect to the investigative use of subpoenas and warrants with the practices and procedures applicable in federal district court.

This proposal would support MJRG Operational Guidance by employing the standards and procedures of the civilian sector insofar as practicable, and by addressing ambiguities in the relationship between Articles 46, 47, and 49 thereby reducing the potential for litigation in these areas.

This proposal relates to the proposed enactment of Article 30a concerning pre-referral proceedings presided over by a military judge. The proposed new article would allow

military judges to modify, quash, or order compliance with subpoenas during the pre-referral, investigative stage of a court-martial case.

8. Legislative Proposals

SEC. 708. SUBPOENA AND OTHER PROCESS.

(a) IN GENERAL.—Section 846 of title 10, United States Code (article 46 of the Uniform Code of Military Justice), is amended as follows:

(1) Subsection (a) of such section (article) is amended—

(A) in the heading, by inserting, "IN TRIALS BY COURTS-MARTIAL" after "EVIDENCE"; and

(B) by striking "The counsel for the Government, the counsel for the accused," and inserting "In a case referred for trial by court-martial, the trial counsel, the defense counsel,".

(2) Subsection (b) of such section (article) is amended to read as follows:

"(b) SUBPOENA AND OTHER PROCESS GENERALLY.—Any subpoena or other process issued under this section (article)—

"(1) shall be similar to that which courts of the United States having criminal jurisdiction may issue;

"(2) shall be executed in accordance with regulations prescribed by the President; and

"(3) shall run to any part of the United States and to the Commonwealths and possessions of the United States.".

(3) Subsection (c) of such section (article) is amended to read as follows:

"(c) SUBPOENA AND OTHER PROCESS FOR WITNESSES.—A subpoena or other process may be issued to compel a witness to appear and testify—

"(1) before a court-martial, military commission, or court of inquiry;

"(2) at a deposition under section 849 of this title (article 49); or

"(3) as otherwise authorized under this chapter."

(4) The following new subsections are added at the end of such section (article):

"(d) SUBPOENA AND OTHER PROCESS FOR EVIDENCE.—

"(1) IN GENERAL.—A subpoena or other process may be issued to compel the production of evidence—

"(A) for a court-martial, military commission, or court of inquiry;

"(B) for a deposition under section 849 of this title (article 49);

"(C) for an investigation of an offense under this chapter; or

"(D) as otherwise authorized under this chapter.

"(2) INVESTIGATIVE SUBPOENA.—An investigative subpoena under paragraph (1)(C) may be issued before referral of charges to a court-martial only if a general court-martial convening authority has authorized counsel for the Government to issue such a subpoena.

"(3) WARRANT OR ORDER FOR WIRE OR ELECTRONIC COMMUNICATIONS.—With respect to an investigation of an offense under this chapter, a military judge

detailed in accordance with section 826 or 830a of this title (article 26 or 30a), may issue warrants or court orders for the contents of, and records concerning, wire or electronic communications in the same manner as such warrants and orders may be issued by a district court of the United States under chapter 121 of title 18, subject to such limitations as the President may prescribe by regulation.

"(e) REQUEST FOR RELIEF FROM SUBPOENA OR OTHER PROCESS.—If a person requests relief from a subpoena or other process under this section (article) on grounds that compliance is unreasonable or oppressive or is prohibited by law, a military judge detailed in accordance with section 826 or 830a of this title (article 26 or 30a) shall review the request and shall—

"(1) order that the subpoena or other process be modified or withdrawn, as appropriate; or

"(2) order the person to comply with the subpoena or other process."

(b) CONFORMING AMENDMENTS.—(1) Section 2703 of title 18, United States Code, is amended—

(A) in the first sentence of subsection (a);

(B) in subsection (b)(1)(A); and

(C) in subsection (c)(1)(A);

by inserting after "warrant procedures" the following: "and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of

Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President".

(2) Section 2711(3) of title 18, United States Code, is amended by—

(A) striking "or" at the end of subparagraph (A);

(B) striking "and" at the end of subparagraph (B) and inserting "or"; and

(C) adding the following new subparagraph:

"(C) a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), to which a military judge has been detailed; and".

SEC. 709. REFUSAL OF PERSON NOT SUBJECT TO UCMJ TO APPEAR, TESTIFY, OR PRODUCE EVIDENCE.

(a) IN GENERAL.—Subsection (a) of section 847 of title 10, United States Code (article 47 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) IN GENERAL.—(1) Any person described in paragraph (2)—

"(A) who willfully neglects or refuses to appear; or

"(B) who willfully refuses to qualify as a witness or to testify or to produce any evidence which that person is required to produce;

is guilty of an offense against the United States.

"(2) The persons referred to in paragraph (1) are the following:

"(A) Any person not subject to this chapter—

"(i) who is issued a subpoena or other process described in subsection (c) of section 846 of this title (article 46); and

"(ii) who is provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage.

"(B) Any person not subject to this chapter who is issued a subpoena or other process described in subsection (d) of section 846 of this title (article 46).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§847. Art. 47. Refusal of person not subject to chapter to appear, testify, or produce evidence".

9. Sectional Analysis

Section 708 contains several amendments to Article 46 pertaining to the opportunity to obtain witnesses and other evidence and the use of subpoenas and other process for courts-martial and for investigative purposes. Currently, Article 46 states only that process issued in "court-martial cases" for witnesses and evidence shall be similar to process issued in federal district court, with no explicit subpoena authority provided, and with no distinction made between different types of proceedings under the UCMJ and the different authorities for subpoenaing witnesses and evidence at different stages in the court-martial process. The proposed changes would maintain and enhance the core features of Article 46, while strengthening the relationships among related provisions in Articles 46, 47, and 49.

Section 708(a) would revise Article 46 as follows:

Article 46(a) would be amended to clarify the provisions governing the opportunity to obtain witnesses and other evidence in cases referred to trial by court-martial.

The limitations and conditions on defense counsel interviews of victims of sex-related offenses currently in Article 46(b) would be moved to Article 6b and expanded to cover all crime victims, consistent with related victims' rights provisions under that statute.

Article 46(b) would restate the current provisions of Article 46(c).

Article 46(c) would clarify current law concerning the issuance of subpoenas or other process to compel witnesses to appear and testify before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49.

Article 46(d) would provide for subpoenas to compel the production of evidence before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49. It would also include an additional paragraph providing authority to issue subpoenas duces tecum for investigations of offenses under the UCMJ, if authorized by a general court-martial convening authority. This provision would enhance the government's ability to issue investigative subpoenas prior to trial, consistent with federal and state practice, and would replace the provision currently contained in Article 47(a)(1) concerning the issuance of subpoenas duces tecum for Article 32 preliminary hearings. In addition, Article 46(d) would authorize military judges to issue warrants or court orders for information pertaining to stored electronic communications in the same manner as U.S. district court judges under the Stored Communications Act (Chapter 121, Title 18) subject to limitations prescribed by the President. This new provision would ensure military criminal investigative organizations and military prosecutors have access to electronic evidence during the investigative stages of court-martial cases, similar to their federal counterparts, and under the same limitations and conditions applicable in federal district court.

Article 46(e) would add a new subsection to provide explicit authority for military judges to modify, quash, or order compliance with subpoenas before and after referral of charges.

Section 708(b) would make conforming amendments to 18 U.S.C. §§ 2703 and 2711(3) to include process issued in court-martial proceedings.

Section 709 contains amendments to Article 47, which provides for criminal prosecution in U.S. district court of civilians who fail to comply with military subpoenas issued under Article 46. The amendments would retain current law under Article 47(a), while updating and clarifying the statute's provisions and the relationship between Articles 46 and 47.

Article 48 – Contempts
10 U.S.C. § 848

1. Summary of Proposal

This proposal would extend the contempt power of military judges under Article 48 to pre-referral proceedings, consistent with the proposal to enact Article 30a (Proceedings Conducted Before Referral). This proposal also would clarify recent amendments to Article 48 in order to remove ambiguities in the language of the current statute with respect to the contempt power of appellate judges. In addition, this proposal would provide for appellate review of contempt punishments in a manner consistent with the review of other orders and judgments under the UCMJ. Part II of the Report will address additional changes needed in the rules implementing Article 48.

2. Summary of the Current Statute

Article 48 provides statutory authority for the punishment of acts of contempt and violations of court orders and rules in courts-martial and other military proceedings. The article's main provision, subsection (a), defines who may punish acts of contempt: judges detailed to courts-martial, courts of inquiry, the Court of Appeals for the Armed Forces, the military Courts of Criminal Appeals, provost courts, and military commissions. It then defines which acts constitute contempt under the statute: (1) the use of "any menacing word, sign, or gesture in the presence of the judge during the proceedings of the court-martial, court, or military commission"; (2) disturbances to such proceedings; and (3) willful failures to obey "the lawful writ, process, order, rule, decree, or command of the court-martial, court, or military commission." Article 48(b) provides that the maximum punishment for contempt is 30 days confinement, a fine of $1,000, or both; and Article 48(c) makes the article inapplicable to military commissions established under Chapter 47A.

3. Historical Background

The power of military courts to punish contemptuous acts has been a part of the military justice system since the original Articles of War provided that "[n]o person whatsoever shall use menacing words, signs, or gestures in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceeding, on the penalty of being punished at the discretion of the said court-martial."[1] By 1893, the language of the statute evolved nearly to its current form, providing courts-martial with the power to summarily punish "any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder."[2] In 1921, Congress expanded this

[1] AW XL of 1775.

[2] AW 86 of 1893.

authority to include "military tribunals" and added a maximum punishment of "one month's confinement or a fine of $100, or both."[3] Under the Articles of War, civilians were not punished for contempt, and only "direct" contempts were proscribed (i.e. those committed in the direct presence of the court or in its immediate proximity).[4] When the UCMJ was enacted in 1950, the contempt authority under Article 48 was revised to include "[a] court-martial, provost court, or military commission."[5] The conduct covered under the statute continued to include only "direct" contempts;[6] however, for the first time, civilians could be punished for contempt by military courts.[7] As Mr. Larkin noted during the Subcommittee hearings:

> Unless [the court-martial] has the power to discipline those before it you may have the most erratic kind of proceedings, and the most disturbing circus atmosphere, as you very frequently have in some sensational civil cases. If the court cannot operate its own proceedings in a dignified manner its proceedings become intolerable.[8]

From 1950 until 2011, Congress substantively amended Article 48 just once, in 2006, when it excluded military commissions under chapter 47A from the article's applicability.[9]

In 2011, Congress made the first significant amendments to Article 48. First, it amended Article 48(a) to identify the "judge detailed to" the court-martial, provost court, or military commission—rather than the court itself—as the disposition authority for contempts.[10] Second, Congress extended the contempt authority to judges detailed to courts of inquiry, the Court of Appeals for the Armed Forces, and the military Courts of Criminal Appeals. The purpose of these changes was to better align military courts procedurally with federal district courts, by providing military trial and appellate judges with a means to directly enforce their court orders, particularly with respect to civilian attorneys who are not

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[3] AW 32 of 1921.

[4] *See, e.g.*, MCM 1917, ¶173(b) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 306 (1920 reprint) (2d ed. 1896)) ("In view, however, of the embarrassment liable to attend the execution, through military machinery, of a punishment adjudged against a civilian for a contempt under the article, it would generally be advisable for the court to confine itself to causing the party to be removed as a disorderly person, and, in an aggravated instance, to procure a complaint to be lodged against him for breach of the public peace."); *see also id.* at ¶173(c) (discussing direct and constructive contempts).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1959 (1949) [hereinafter *Hearings on H.R. 2498*].

[6] *See* MCM 1951, ¶118; R.C.M. 809(a) (Discussion).

[7] *See* 1951 MCM, ¶118 ("The words 'any person' as used in Article 48, include all persons, whether or not subject to military law, except the law officer and the members of the court.").

[8] *Hearings on H.R. 2498*, *supra* note 5, at 1060.

[9] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(2), 120 Stat. 2600 (2006).

[10] NDAA FY 2011, Pub. L. No. 111-383, § 542, 124 Stat. 4218 (2011).

subject to military discipline.[11] These changes also better aligned Article 48 with the procedures applicable to contempt proceedings under R.C.M. 809, which was amended in 1998 in order to eliminate the members' involvement in the contempt disposition process.[12] In addition to vesting the contempt authority in trial and appellate judges, the 2011 amendments: (1) raised the maximum monetary punishment under Article 48(b) from $100 to $1,000; and (2) added subsection (a)(3) to the statute to make "indirect" contempts directly punishable by the military judge, including willful failures to follow the lawful writ, process, orders, or rules of the court.[13] Article 47 (Refusal to appear or testify), by contrast, provides only for indirect enforcement of process issued to civilian witnesses and evidence custodians, via prosecution by the U.S. attorney in U.S. district court.

4. Contemporary Practice

The President has implemented Article 48 through R.C.M. 201(c), defining court-martial jurisdiction for the contempt power, and R.C.M. 809, providing the rules and procedures for contempt proceedings. R.C.M. 809(b) provides that acts of contempt directly witnessed by the court may be punished summarily, and that acts committed outside the immediate presence of the court (such as disturbances in the waiting area) shall be disposed of through notice and hearing. R.C.M. 809(c) provides the procedures applicable for contempt proceedings, and R.C.M. 809(d) provides that convening authorities—rather than the Courts of Criminal Appeals—are responsible for reviewing the records of contempt proceedings and approving or disapproving the findings and sentence in whole or in part. Under the rule, the convening authority's action is not subject to further review or appeal.[14] Because of this, there has been very little litigation concerning Article 48 and the rules implementing the statute, and the Court of Appeals for the Armed Forces has reviewed contempt rulings at the trial level only as mandamus requests.[15]

As currently drafted, R.C.M. 201(c) and R.C.M. 809 contain several ambiguities that may prevent the contempt authority under Article 48 from being exercised effectively by military trial and appellate judges. First, despite the 2011 amendments to Article 48, both rules continue to refer to the "court-martial" itself as the contempt authority; both rules also continue to quote the pre-2011 version of the article, in which only "direct" contempts were punishable and the maximum monetary punishment for a contempt finding was

[11] *See* Article 48, UCMJ – DoD Proposed NDAA FY 2011 Amendment, as included in S. 3454 by the Senate Armed Services Committee, June 4, 2010, *available at* http://www.dod.gov/dodgc/images/article48_ucmj.pdf. The fact that judges on the Court of Appeals for the Armed Forces and the military Courts of Criminal Appeals are not "detailed" to their respective courts in the same way that military judges are "detailed" to courts-martial appears to have been an oversight in the 2011 amendments.

[12] *See* MCM, App. 21 (R.C.M. 809(f), Analysis).

[13] NDAA FY 2011, *supra* note 10, at § 542.

[14] R.C.M 809(d); *see Hearings on H.R. 2498*, *supra* note 5, at 1060 (statement of Mr. Smart) ("There is a limited punishing power and there is no appeal. It is a summary citation for contempt.").

[15] *See, e.g.*, United States v. Burnett, 27 M.J. 99 (C.M.A. 1988); Hassan v. Gross, 71 M.J. 416 (C.A.A.F. 2012).

$100.[16] Second, R.C.M. 809 appears to have been drafted entirely with an eye toward contempt findings at trial by a detailed military judge, as there is no mechanism provided in the rule for a convening authority to "review" or "approve" a contempt finding by a judge serving on the Court of Appeals for the Armed Forces or a military Court of Criminal Appeals. Finally, because the convening authority's action on the court's contempt findings and sentence is final and not subject to further review or appeal, the military judge's ability to use the contempt power to enforce court rules is limited. This limitation is inconsistent with other judicial functions—deciding on continuance requests, excluding evidence, determining which witnesses and evidence will be produced—which are reviewed by the appellate courts for abuse of discretion. It also creates a potential for disparate treatment of trial and defense counsel with respect to the convening authority's action on any contempt findings by the military judge. The requirement for convening authority review is based on previous practice and appears to be a holdover from Manual provisions that pre-dated the establishment of military judges and the military Courts of Criminal Appeals.[17]

5. Relationship to Federal Civilian Practice

Although the 2011 amendments to Article 48 helped to bring military contempt procedures into closer alignment with the contempt procedures applicable in U.S. district court, several major differences remain. First, because federal civilian courts are permanent standing courts—as opposed to the *ad hoc* courts convened under the UCMJ—the contempt power of federal judges is provided by statute in terms that do not limit its exercise to specified proceedings.[18] For example, under 28 U.S.C. § 636, magistrate judges have the power "within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority" with respect to any contemptuous acts conducted "in the magistrate judge's presence so as to obstruct the administration of justice."[19] By contrast, under Article 48, the judge's contempt authority is confined to the specific court-martial or other proceeding to which the judge has been detailed. A second major difference between the two systems is that in the federal civilian system, a person punished for contempt is provided a right of appeal to the appropriate United States court of appeals upon entry of judgment.[20] Neither R.C.M. 809 nor Article 66 (Review by Court of Criminal Appeals) provide for appellate review of the detailed military judge's contempt

[16] *Compare* Article 48 ("A judge detailed to a court-martial . . . may punish for contempt any person who . . .") *with* R.C.M. 201(c) ("A court-martial may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.") *and* R.C.M. 809(a) ("Courts-martial may exercise contempt power under Article 48") *and* R.C.M. 809(a), Discussion (quoting and providing analysis of the pre-2011 version of Article 48).

[17] *Hearings on H.R. 2498*, *supra* note 5, at 1060 (statement of Mr. Smart) ("There is a limited punishing power and there is no appeal. It is a summary citation for contempt.").

[18] *See* 18 U.S.C. § 401 (Power of court).

[19] 28 U.S.C. § 636(e)(1)-(2) (emphasis added).

[20] *See, e.g.*, 28 U.S.C. § 636(c)(3).

findings. Instead, as noted above, R.C.M. 809(d) provides for convening authority review of all contempt findings, and "[t]he action of the convening authority is not subject to further review or appeal."[21] Also, unlike military contempt proceedings, where the military judge always determines the findings and sentence, persons cited for contempt in federal district court are entitled to jury trials in certain cases, and judges are disqualified from presiding over contempt trials when the alleged contempt involves disrespect toward or criticism of the judge, unless the defendant consents.[22] Finally, unlike the fixed maximum punishment for contempt under Article 48, the maximum punishment in federal district court varies depending on the forum: when tried by a jury, the maximum punishment for contempt is a $1000 fine and confinement for six months; when the judge issues a summary disposition, the maximum punishment is a fine of $300 or 45 days confinement; and when a magistrate judge presides over the contempt proceedings, the punishment cannot exceed the penalties for a Class C misdemeanor.[23]

6. Recommendation and Justification

Recommendation 48.1: Amend Article 48(a) to extend the contempt power to include military judges and military magistrates detailed to pre-referral proceedings under the proposed Article 30a.

This change would ensure that military judges and magistrates have the authority to directly enforce their orders and court rules in any proceeding to which they have been detailed, including pre-referral proceedings under the proposed Article 30a.

Part II of this Report will address whether the contempt powers of military judges and military magistrates should involve different maximum punishments, consistent with the tiered approach in federal civilian practice.

Recommendation 48.2: Amend Article 48(a) to clarify that judges on the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals do not have to be "detailed" to cases or proceedings in order to exercise the contempt power under Article 48, and to clarify that the president (as opposed to the judge) of a court of inquiry is vested with the contempt power.

As amended by NDAA FY 2011, Article 48 vests the contempt power in "judge[s] detailed to" various military courts, including the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals. This is inconsistent with the fact that military and civilian judges who serve on these appellate courts are not "detailed" to cases in the same sense that military judges are detailed to courts-martial. Unlike courts-martial, which are *ad hoc* courts convened to consider specific cases, these appellate courts are standing courts; the

[21] R.C.M. 809(d).

[22] FED. R. CRIM. P. 42(a)(3).

[23] *See* 42 U.S.C. § 1995; 28 U.S.C. § 636.

contempt authority of the judges who serve on these courts, therefore, should not be contingent on having been "detailed."

This proposal also would clarify that the "president of a court of inquiry," as opposed to "a judge detailed to . . . a court of inquiry," is vested with the contempt authority. This change reflects that military judges are not detailed to courts of inquiry. It is consistent with R.C.M. 703(e)(2)(C), which provides that "the president of a court of inquiry" may issue subpoenas to secure witnesses or evidence for the proceeding.

Recommendation 48.3: Amend Article 48 to provide for appellate review of contempt punishments consistent with the review of other orders and judgments under the UCMJ.

The proposed new subsection (c) providing for appellate review of contempt punishments would better align military procedures with respect to review of contempt findings and sentences by military courts with the procedures applicable in federal district courts and federal appellate courts.

By transferring the review function for the military judge's contempt findings from the convening authority to the Courts of Criminal Appeals, this proposal would eliminate the potential for unequal treatment of the trial and defense counsel by the convening authority exercising the contempt review authority. In addition, this proposal would eliminate the anomaly under the current rules that the convening authority is responsible for reviewing contempt orders by appellate judges.

This change also would enhance the legitimacy of the military's contempt power under Article 48, by ensuring that individuals—particularly civilian attorneys and witnesses—who are held in contempt of court by military judges can seek review of the contempt citation by a neutral, detached appellate judge, as opposed to the convening authority who referred the charges for trial in the underlying case.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by employing the standards and procedures of the civilian sector insofar as practicable in military criminal practice.

This proposal would support the MJRG Operational Guidance by ensuring that the court-martial process employs the standards and procedures of the civilian sector with respect to the contempt power of trial judges insofar as practicable. Though this is an area recently addressed by Congress, the proposed amendments would further the intent of the recent amendments by better aligning the contempt power of military judges with that of federal court judges and strengthening the contempt power as a tool to directly enforce court rules and orders in military proceedings.

8. Legislative Proposal

SEC. 710. CONTEMPT.

(a) AUTHORITY TO PUNISH.—Subsection (a) of section 848 of title 10, United States Code (article 48 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) AUTHORITY TO PUNISH.—(1) With respect to any proceeding under this chapter, a judicial officer specified in paragraph (2) may punish for contempt any person who—

"(A) uses any menacing word, sign, or gesture in the presence of the judicial officer during the proceeding;

"(B) disturbs the proceeding by any riot or disorder; or

"(C) willfully disobeys a lawful writ, process, order, rule, decree, or command issued with respect to the proceeding.

"(2) A judicial officer referred to in paragraph (1) is any of the following:

"(A) Any judge of the Court of Appeals for the Armed Forces and any judge of a Court of Criminal Appeals under section 866 of this title (article 66).

"(B) Any military judge detailed to a court-martial, a provost court, a military commission, or any other proceeding under this chapter.

"(C) Any military magistrate designated to preside under section 819 or section 830a of this title (article 19 or 30a).

"(D) Any commissioned officer detailed as a summary court-martial.

"(E) The president of a court of inquiry.".

(b) REVIEW.—Such section (article) is further amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following new subsection (c):

"(c) REVIEW.—A punishment under this section—

"(1) if imposed by a military judge or military magistrate, may be reviewed by the Court of Criminal Appeals in accordance with the uniform rules of procedure for the Courts of Criminal Appeals under section 866(i) of this title (article 66(i));

"(2) if imposed by a judge of the Court of Appeals for the Armed Forces or a judge of a Court of Criminal Appeals, shall constitute a judgment of the court, subject to review under the applicable provisions of section 867 or 867a of this title (article 67 or 67a); and

"(3) if imposed by a summary court-martial or court of inquiry, shall be subject to review by the convening authority in accordance with rules prescribed by the President.".

(c) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§848. Art. 48. Contempt".

9. Sectional Analysis

Section 710 would amend Article 48, which provides statutory authority for the punishment of acts of contempt and violations of court orders and rules in courts-martial and other proceedings under the UCMJ. In 2011, Congress made significant amendments to Article 48 that provided a more direct means for military judges to enforce court orders and military subpoenas, and better aligned the contempt authority and procedures in military courts with those in federal district courts. However, the language of the statute as amended is ambiguous with respect to the contempt power of judges serving on the Court of Appeals for the Armed Forces and the military Courts of Criminal Appeals.

Section 710(a) would clarify the recent amendments to Article 48 by defining the judicial officers who may exercise the contempt authority to include judges of the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals; military judges detailed to courts-martial, provost courts, military commissions, or any other proceeding under the UCMJ (including the proposed Article 30a proceedings); military magistrates designated under Articles 19 or 30a; commissioned officers detailed as summary courts-martial; and presidents of courts of inquiry.

Section 710(b) would transfer the review function for contempt punishments issued by military and appellate judges from the convening authority to the appropriate appellate court. This change would strengthen the contempt power and would ensure that persons held in contempt of court by military judges and appellate judges—particularly civilian attorneys and witnesses—are afforded a fair appellate review process, comparable to the review process applicable in civilian criminal courts and appellate courts across the country. The convening authority's review function would be retained for contempt punishments issued by summary courts-martial and courts of inquiry.

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Article 49 – Depositions
10 U.S.C. § 849

1. Summary of Proposal

This proposal would amend Article 49 to reflect current deposition practice, case law, related statutory provisions, and related proposals in this Report. The proposed amendments also would better align military deposition practice with federal civilian deposition practice by ensuring that depositions generally are ordered in military criminal cases only when it is likely that a prospective witness's trial testimony otherwise would be lost.

2. Summary of the Current Statute

Article 49 provides statutory authority for the taking of depositions by the parties; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Subsection (a) requires the party requesting a deposition to demonstrate that, "due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing . . . or a court-martial." Subsection (a)(1) provides that depositions may be ordered between preferral and referral of charges by the convening authority, and after referral of charges by either the convening authority or the military judge. Under subsection (a)(3), the convening authority may designate commissioned officers to represent the prosecution and the defense during deposition hearings and to take the deposition of any witness. The article's remaining five subsections require that the party requesting the deposition give reasonable notice to the other parties of the time and place of the deposition; authorize the deposition officer to be any military or civil officer authorized to take oaths; provide rules and restrictions concerning the admissibility of depositions at trial in non-capital cases; and authorize the use of depositions by the defense in capital cases, and by either party in cases when death is authorized but not mandatory and the convening authority directs that the case be treated as not capital.

3. Historical Background

Congress derived Article 49 from Articles 25 and 26 of the 1920 Articles of War, as amended by the Elston Act of 1948.[1] Under the Articles of War, the parties had greater flexibility in taking depositions and using them at trial than in most civilian jurisdictions, where the ordering of depositions is generally tied to prospective witness unavailability at trial. When the UCMJ was enacted in 1950, Congress maintained this variance with civilian practice (and expanded it slightly) by expressly allowing the parties to take oral or written

[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1065 (1949) [hereinafter *Hearings on H.R. 2498*].

depositions at any time after preferral of charges, unless forbidden by a competent convening authority "for good cause."[2] The main justifications offered for Article 49's openness to taking depositions and using them as a substitute for live witness testimony at trial included the greater mobility of servicemembers, the risk of sudden death for potential court-martial witnesses prior to trial, and the remoteness of many overseas duty stations. As Professor Everett commented in 1960:

> Many exigencies peculiar to the Armed Services undoubtedly led Congress to authorize in Article 49 of the [UCMJ]—and in previous parallel legislation—a use of depositions unparalleled elsewhere in American criminal law administration. 'For instance, when the Armed Services are operating in foreign countries where there is no American subpoena power, it might be impossible to compel a foreign civilian witness to come to the place where the trial is held, and yet he may be quite willing to give a deposition. Furthermore, military life is marked by transfers of personnel—the military community being much more transient than most groups of civilians. To retain military personnel in one spot so that they will be available for a forthcoming trial, or to bring them back from a locale to which they have been transferred, might involve considerable disruption of military operations. Likewise, in combat areas there is often considerable risk that a witness may be dead before trial date, in which event, were civilian rules to be followed, his testimony would be lost.[3]

During the 1949 congressional hearings, Representative Elston suggested that Article 49 provided an important protection for servicemembers accused of offenses, particularly in deployed environments: "I think the reason we provided for depositions . . . was to give the accused a greater opportunity. . . . [T]he complaint we had to deal with was that an accused person was often deprived of witnesses. So we wrote into the law that depositions could be taken."[4] In the decade following the UCMJ's enactment, military courts generally embraced these early justifications for the Article 49's openness to allowing depositions to be taken and used at trial.[5] When the position of military judge was created in 1968, Congress chose

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[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498*, *supra* note 1, at 1065.

[3] Robinson O. Everett, *The Role of Depositions in Military Justice*, 7 MIL. L. REV. 131 (1960) (quoting ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 221-22 (1956)). Two decades after writing these comments on Article 49, Professor Everett would become Chief Judge of the Court of Military Appeals.

[4] *Hearings on H.R. 2498*, *supra* note 1, at 696. Not everyone at the Congressional hearings shared Representative Elston's (and Professor Everett's) view that an expansive use of depositions in courts-martial was desirable, let alone necessary. As stated by Mr. John Finn, spokesperson for the American Legion: "[Article 49] loses sight of the ancient right afforded in English and American justice of the right of confrontation of an accused by his accusers. It is believed that no greater latitude with regard to the use of depositions should be allowed in the proposed code than is presently allowed under the rules of criminal procedure presently in effect in the United States courts. . . . It seems that the military services were able to get along from their inception until comparatively recent times without the use of depositions to convict alleged guilty parties. In these days of airplane and other means of rapid transportation, the necessity for the use of depositions seems to be less apparent than ever." *Id.* at 685.

[5] *See, e.g.*, United States v. Drain, 16 C.M.R. 220, 221 (C.M.A. 1954) ("We recognize that the broad use of depositions against a defendant in criminal cases is peculiar to military law, and that it arises justifiably from

to maintain a key aspect of this variance between military and civilian deposition practice, extending Article 49(a)'s limited authority to forbid depositions "for good cause" to military judges following referral of charges to court-martial.[6]

In the 1960s and '70s, military courts endeavored to reconcile Article 49's broad language concerning the availability of depositions in court-martial proceedings with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[7] In *United States v. Jacoby*, the Court of Military Appeals reversed a line of cases which held that Article 49 "expressly or by necessary implication" made the Sixth Amendment right of confrontation inapplicable in the military setting.[8] In its decision, the Court acknowledged "[t]hat the exigencies of the military service frequently prohibit the appearance of a military witness or a civilian far removed from the place of trial"; nevertheless, it held that the Sixth Amendment right to confront witnesses does indeed apply to servicemembers in court-martial proceedings, and that a military accused's right of confrontation is not satisfied unless he or she is given the opportunity to be present at the taking of depositions and to cross-examine the deposed witnesses in person.[9] A decade later, in *United States v. Davis*, the Court of Military Appeals struck down the so-called "100-mile rule" of Article 49(d)(1) with respect to military witnesses, announcing that "depositions are an exception to the general rule of live testimony and are to be used only when the Government cannot reasonably have the witness present at trial."[10] Then, in 1980, the President exercised rule-making authority

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difficulties in obtaining witnesses—which difficulties are unique to law administration in the Armed Forces"); *see also* LT Dale Read, Jr., *Depositions in Military Law*, 26 JAG JOURNAL 181, 184-85 (1972) ("[T]he court's assertion that 'the broad use of depositions against a defendant in criminal cases is peculiar to military law' stems from no more than a recognition that the basic nature of military life is such that a significantly greater percentage of witnesses will be unavailable at the time of trial than is true in civilian courts."); Col. Mark L. Allred, *Depositions and a Case Called Savard*, 63 A.F. L. REV. 1, 7-10 (2009) ("[A]s our military society is both highly mobile and of global reach, situations in which there is no legal process for securing the attendance of potentially important witnesses are not uncommon in courts-martial. . . . Because military members deploy to war zones, the high seas, and other locations from which they cannot easily return, taking their depositions is often wise.").

[6] Article 49(a) (1968-2014) (". . . [A]ny party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause.").

[7] U.S. CONST. amend. VI.

[8] 29 C.M.R. 244 (C.M.A. 1960) (reversing United States v. Sutton, 11 C.M.R. 220 (C.M.A. 1953); United States v. Parrish, 22 C.M.R. 127 (C.M.A. 1956)).

[9] 29 C.M.R. at 249.

[10] 41 C.M.R. 217, 220 (C.M.A. 1970); *see also* Read, Jr., *supra* note 5, at 198 ("The effect of this section is to emasculate the nationwide service of process in article 46; though service of subpoena may still be made, a deposition may be used instead if the witness is presently beyond a 100-mile radius, or beyond a state line regardless of distance. This provision differs markedly from civilian practice and cannot be justified by any condition 'unique to law administration in the Armed Forces.' Moreover, it contravenes the congressional intent to place, 'in so far as reasonably possible . . . military justice on the same plane as civilian justice.'") (citations omitted).

under Article 36 to adopt the military rules of evidence (modeled after the federal rules of evidence), including M.R.E. 804(a), which provided situational definitions for "unavailability as a witness" that effectively replaced Article 49(d)'s "unavailability" criteria. Each of these events brought military deposition practice closer in line with federal civilian deposition practice—affording the accused greater protections while narrowing the range of situations in which depositions could be presented as evidence by either party in courts-martial.

Aside from considerations governing the use of depositions at trial, depositions also have been used in connection with Article 32 investigations as a means of defense discovery.[11] In 2014, Congress transformed the Article 32 investigation into a "preliminary hearing" and provided that crime victims may not be compelled to testify at the hearing.[12] In 2015, Congress amended Article 49(a) to expressly authorize the ordering of depositions to preserve prospective witness testimony "for use at a preliminary hearing."[13] At the same time, Congress removed the broad language in Article 49 authorizing the parties to take depositions at any time unless forbidden "for good cause." In place of this broad language, Congress provided a more restrictive standard for ordering depositions, based on the language of R.C.M. 702 and Fed. R. Crim. P. 15. Under the amended statute, depositions may be ordered by convening authorities—and by military judges after referral of charges—"only if the [requesting] party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing . . . or a court-martial."[14]

4. Contemporary Practice

The ordering and use of depositions in current military practice is somewhat rare. R.C.M. 702(a) emphasizes that depositions should be ordered in "exceptional circumstances . . . [when] it is in the interest of justice that the testimony of a prospective witness be taken

[11] *See* MCM, App. 21 (R.C.M. 702(c)(3)(A), Analysis) ("Article 49 [has served] as a means of satisfying the discovery purposes of Article 32 when the Article 32 proceeding fails to do so.") (citing United States v. Chuculate, 5 M.J. 143, 145 (C.M.A. 1978) (deposition may be an appropriate means to allow sworn cross-examination of an essential witness who was unavailable at the Article 32 hearing), United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976) (deposition may be an appropriate means to cure error where witness was improperly found unavailable at Article 32 hearing), and United States v. Cumberledge, 6 M.J. 203, 205, n.3 (C.M.A. 1980)); *see also Hearings on H.R. 2498*, *supra* note 1, at 997 (statement of Mr. Larkin) ("[N]ot only does [Article 32] enable the investigating officer to determine whether there is probable cause . . . but it is partially in nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to."); United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959) ("It is apparent that [Article 32] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.").

[12] NDAA FY 2014, § 1702.

[13] Article 49(a)(2), as amended by NDAA FY 2015, § 532.

[14] *Id.* In its current form, Article 49 authorizes the ordering of depositions for use at preliminary hearings, but Article 47 does not provide a mechanism for enforcing these orders in the case of civilian witnesses.

and preserved for use at a preliminary hearing . . . or a court-martial."[15] This language was derived, in part, from the federal rule on depositions, which states that "[a] party may move that a prospective witness be deposed in order to preserve testimony for trial," and that "[t]he court may grant the motion because of exceptional circumstances and in the interest of justice."[16] The 2015 amendments to Article 49(a) updated the statute to reflect the more restrictive language from R.C.M. 702(a). R.C.M. 702's remaining subsections cover who may order depositions; the procedures for requesting, acting upon requests for, and conducting depositions; notice requirements; the duties of deposition officers; objections; and depositions by agreement of the parties.[17] With respect to the admissibility of depositions at court-martial, M.R.E. 804 prohibits the use of depositions unless the moving party can establish that the deponent is unavailable to testify in person. Article 49(d)(1)'s "100-mile rule" is not included among the situational definitions of "unavailability" given in M.R.E. 804(a); rather, the rule states that "'[u]navailability as a witness' includes situations in which the declarant is unavailable within the meaning of Article 49(d)(2)."[18] There are four unavailability criteria contained in Article 49(d)(2) that are not *also* contained in M.R.E. 804(a): age, imprisonment, military necessity, and "other reasonable cause."[19]

In 2014, the Response Systems to Adult Sexual Assault Crimes Panel observed that Congress's transformation of the Article 32 investigation into a preliminary hearing "may result in additional requests to depose victims and other witnesses."[20] In a recent executive order, the President has amended R.C.M. 702 to clarify the recent amendments to Articles 32 and 49.[21] The amendments to the rule are as follows:

R.C.M. 702(a) clarifies that "exceptional circumstances" for ordering a deposition do not include a victim's refusal to testify at a preliminary hearing or to submit to pretrial interviews. Subsection (a) also requires the convening authority or military judge to

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[15] R.C.M. 702(a).

[16] FED. R. CRIM. P. 15(a)(1).

[17] R.C.M. 702(b)-(i).

[18] M.R.E. 804(a)(6).

[19] *See* MCM, App. 22 (M.R.E. 804(a)(6), Analysis) ("Rule 804(a)(6) . . . has been added in recognition of certain problems, such as combat operations, that are unique to the armed forces. Thus, Rule 804(a)(6) will make unavailable a witness who is unable to appear and testify in person for reason of military necessity within the meaning of Article 49(d)(2). The meaning of 'military necessity' must be determined by reference to the cases construing Article 49. The expression is not intended to be a general escape clause, but must be restricted to the limited circumstances that would permit use of a deposition."). The analysis section is silent on the other three "unavailability" criteria that appear in Article 49(d)(2) but do not appear in Rule 804(a): age, imprisonment, and "other reasonable cause."

[20] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 48 (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT].

[21] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

determine, by a preponderance of the evidence, that the victim will not be available to testify at court-martial before ordering a deposition of the victim.[22]

The standard for acting on requests for depositions of (non-victim) witnesses under R.C.M. 702(c)(3)(A) has been changed from "may be denied only for good cause" to "whether the requesting party has shown, by a preponderance of the evidence, that due to exceptional circumstances and in the interest of justice, the testimony of the prospective witness must be taken and preserved for use at a preliminary hearing under Article 32 or court-martial."

The requirement under R.C.M. 702(c)(2) that parties requesting depositions must include "[a] statement of the reasons for taking the deposition" in their request has been eliminated.

The Discussion section after R.C.M. 702(c)(3)(A) explaining which situations would constitute good cause for denial of a deposition request has been eliminated.

R.C.M. 702(d)(1) requires that a judge advocate certified under Article 27(b) be detailed as the deposition officer, unless "not practicable."

The rule changes create two different standards in the context of ordering pretrial depositions of prospective witnesses: one standard for victims (unavailability at trial), and a slightly broader standard for non-victim witnesses (exceptional circumstances and in the interest of justice). The changes also closely align the qualification requirements for deposition officers with those of preliminary hearing officers under the 2014 amendments to Article 32.[23]

5. Relationship to Federal Civilian Practice

In the federal criminal justice system and in the vast majority of state jurisdictions, depositions are not authorized for purposes of discovery. Instead, depositions are generally tied to prospective witness unavailability.[24] This is particularly true in jurisdictions that utilize the preliminary hearing as the primary pretrial screening device for charges.[25] In the federal civilian system, the primary purpose of depositions in criminal cases is explicitly to "preserve testimony for trial," and the admissibility of a deposition at trial is determined solely by the rules of evidence.[26] The courts have held that a federal judge's discretion in ordering depositions "is not broad and should be exercised carefully."[27] Also under the

[22] *Id.*

[23] *See* Article 32(b) ("A preliminary hearing . . . shall be conducted by an impartial judge advocate certified under [article 27(b)] whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate.").

[24] WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 20.2(e) (3d ed. 2013).

[25] *Id.*

[26] FED. R. CRIM. P. 15(a)(1) and 15(d).

[27] United States v. Mann, 590 F.2d 361, 365 (1st Cir. 1978).

federal rule, "only the 'testimony of a prospective witness of a party' can be taken . . . [which] means the party's own witness [and not] an adverse witness."[28] In contrast to the opportunity under Article 49 for the use of depositions as a discovery device, the standards in the federal civilian system do not include such situations, regardless of the witness's availability to testify at trial. A slightly different formulation of the rule is prevalent in many state jurisdictions, where statutes and rules of criminal procedure concerning the ordering of depositions require a showing "that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material, and that it is necessary to take the witness' deposition in order to prevent a failure of justice."[29]

With respect to the admissibility of depositions at trial, Article 49(d)'s rules for using depositions at trial are significantly less restrictive than the rules provided under federal common law, where the Supreme Court has long held the use of depositions in criminal cases to be violative of the accused's Sixth Amendment right to confront adverse witnesses except in a narrow range of situations. In *Mattox v. United States*, 156 U.S. 237 (1895), the Court explained the antagonism between depositions and the Confrontation Clause as follows:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[30]

More recently, the Court has held that depositions may not be used against an accused at trial even when the deposed witness is incarcerated at the time of trial and the accused previously has had ample opportunity to cross-examine the witness at a preliminary hearing, unless the prosecution can affirmatively show that the witness's presence at trial cannot practicably be obtained.[31] The enactment of the Federal Rules of Evidence in 1975 and the Military Rules of Evidence five years later narrowed the gap between the two systems with respect to the admissibility of depositions as evidence at trial, as the situational definitions for "unavailability as a witness" contained in M.R.E. 804(a) are largely identical to those contained in Fed. R. Evid. 804(a). However, the additional

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[28] FED. R. CRIM. P. 15 advisory committee note to 1974 Amendments.

[29] LAFAVE ET AL., *supra* note 24, at § 20.2(e) (3d ed.) (citing Idaho Crim. Rules 15(a); Kan. Stat. Ann. § 22-3211; Ky. R. Crim. P. 7.10; Me. R. Crim. P. 15(a)).

[30] 156 U.S. 237, 242-43 (1895). *See also* Motes v. United States, 178 U.S. 458 (1900) (Confrontation Clause violated by permitting a deposition of an absent witness taken at a preliminary proceeding to be read at the final trial where the witness's unavailability at trial was caused by the negligence of the prosecution and not because of any suggestion, connivance, or procurement of the accused).

[31] Barber v. Page, 390 U.S. 719 (1968).

"unavailability" criteria in Article 49(d)(2) that are not contained in the Rule—age, imprisonment, military necessity, and "other reasonable cause"—continue to allow for greater use of depositions in military criminal proceedings than in federal civilian practice.

A final difference between military and civilian deposition practice concerns the timing of the right to request depositions. Article 49(a) expressly limits the parties' ability to request depositions until after preferral of charges; Fed. R. Crim. P. 15(a), by contrast, contains no such limitation. In 1971, the Army Court of Military Review considered whether "pre-preferral" depositions could be ordered and concluded that, by its text, Article 49 does not authorize such depositions. In so holding, the Court also noted that, from the accused's perspective, "knowledge of the charge is essential to effective cross examination."[32] Federal case law has echoed this Sixth Amendment concern in the face of government motions for "pre-indictment" depositions of prospective witnesses.[33] However, in one recent decision, a federal district court ordered pre-indictment depositions on government motion where the prospective witnesses were likely to die soon.[34] In resolving the matter in favor of the government, the court looked to the text and history of the federal rule, which suggests that pre-indictment depositions may be ordered "in exceptional circumstances and in the interests of justice." Regarding the accused's Sixth Amendment concerns, the court noted that "the defense can always file a motion to suppress before trial" if the government moves to introduce a deposition that should not be admitted as a Constitutional matter.[35] Conceivably, the government could face a similar situation in a military case, particularly in a deployed environment, where it would be premature to prefer charges but also highly likely that a prospective witness's testimony would be lost without a deposition. In such a situation, the federal rule's greater flexibility allows the court to craft appropriate protections for the accused's Sixth Amendment rights on a case-by-case basis, ensuring that the "interests of justice" are not sacrificed merely because the factual situation confronted by the government is unusual. It is also arguable that the term "party" in Article 49(a) already implies the existence of an "accused," which itself implies the existence of preferred charges and specifications.[36] If this is the case, then Article 49(a)'s "post-preferral" timing requirement is not only unnecessary; it is redundant.

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[32] United States v. Vicencio, 44 C.M.R. 323, 329 (A.C.M.R. 1971).

[33] *See* In re Grand Jury Proceedings, 697 F. Supp. 2d 262 (D.R.I. 2010) (holding that "pre-indictment" depositions of nine terminally ill witnesses who were bystanders in an alleged scheme to defraud insurers were authorized under the rule, where the government assured the court that it would provide the defense with necessary discovery to cross-examine the witnesses effectively, and where the interests of justice favored ordering depositions, because otherwise the witnesses would likely die and prosecuting the case would become impossible).

[34] *Id.*

[35] *Id.* at 266, 274.

[36] *See* R.C.M. 103(16) (definition of "party"); Article 1(9) ("The term 'accuser' means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.").

6. Recommendation and Justification

Recommendation 49.1: Amend Article 49(a) to more closely mirror the language and function of Fed. R. Crim. P. 15(a)(1), while moving the more procedural aspects of this provision to R.C.M. 702. Specifically, amend subsection (a)(1) to provide that "a convening authority or a military judge may order depositions . . . only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be preserved for use at a court-martial, military commission, court of inquiry, or other military court or board.

This proposal would reduce Article 49(a) to its essential elements, allowing the more procedural aspects of requesting and ordering depositions to be moved to the rules implementing the statute. The result would be a clearer, more functional statute, and one less likely to require further amendments as practice in this area develops over time.

This proposal would clarify that depositions may not be ordered specifically for use at Article 32 preliminary hearings. This change would reflect federal civilian practice and would address the absence of subpoena authority under Article 47 to compel civilian witnesses to provide such depositions for use at preliminary hearings (as opposed to depositions for use at courts-martial, military commissions, and courts of inquiry). Importantly, depositions are not the only means of obtaining information for an Article 32 proceeding when in person testimony is not available. R.C.M. 405, the rule implementing Article 32, also provides for the use of sworn statements and testimony via remote means for witnesses who are not reasonably available to testify in person (as well as unsworn statements when the defense does not object). These alternatives should provide a sufficient means to obtain relevant witness testimony for the limited purposes of the preliminary hearing in most cases.

Under the proposal, a properly ordered deposition that complies with Article 49(a) (e.g., one not ordered specifically for use at an Article 32 preliminary hearing) may be used as a substitute for live testimony at a preliminary hearing.

Under current law, military judges are unable to order depositions or review denials of deposition requests by convening authorities until after the charges are referred to court-martial. By removing this prohibition, the proposed amendments to Article 49(a) would—in conjunction with the proposal to enact Article 30a—give the accused an avenue for judicial relief in cases where the convening authority improperly denies a pretrial deposition request.[37] Under current practice, such denials can result in lost testimony during the critical, investigative stages of a military criminal case. This change would prevent such loss.

This proposal also would remove Article 49(a)'s timing requirement, which limits the parties' ability to request depositions until after preferral of charges under Article 30. This timing requirement varies from the federal civilian rule unnecessarily. The new statutory rule for ordering depositions—"due to exceptional circumstances, [and] in the interest of

[37] *Accord* RESPONSE SYSTEMS PANEL REPORT, *supra* note 20, at 49 (Recommendation 118).

justice"—provides convening authorities and military judges with a clear standard for determining when, if ever, "pre-preferral" depositions may be warranted. Furthermore, under R.C.M. 103(16) and Article 1(9), the definition of "party" in military law arguably implies the existence of preferred charges and specifications, making this qualification in the current statute redundant at best.

Recommendation 49.2: Redesignate Article 49(b) as Article 49(a)(3), and amend the language of the provision by replacing the phrase "The party at whose instance a deposition is to be taken . . ." with the more direct phrase, "A party who requests a deposition . . . ."

This proposal would update the language of Article 49(b) to clarify the provision in the context of the statute's other provisions.

Recommendation 49.3: Redesignate Article 49(c) as Article 49(a)(4), and amend the language of the provision to reflect recent amendments to Article 32(b) and proposed changes to R.C.M. 702(d)(1), by requiring that deposition officers be judge advocates certified under Article 27(b) "whenever practicable."

Under current law, depositions "may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths." This allows for the detail of deposition officers who are not legally trained, with no requirement that judge advocates act as the deposition officer whenever practicable.

The proposed change to R.C.M. 702(d)(1) would require the convening authority to detail impartial judge advocates certified under Article 27(b) as deposition officers unless "not practicable." Similarly, Article 32(b) now requires judge advocates to be detailed as preliminary hearing officers "whenever practicable." This amendment would align deposition officer qualification requirements under Article 49 with the similar qualification requirements for preliminary hearing officers under Article 32.

Recommendation 49.4: Redesignate Article 49(a)(3) as Article 49(b) (Representation by Counsel), and amend the provision to provide that: (1) representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under Article 27; and (2) the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in Article 38(b).

Article 49(a)(3) currently provides that the convening authority "may designate commissioned officers as counsel for the Government and counsel for the accused, and may authorize those officers to take the deposition of any witness." R.C.M. 702(d)(2), by contrast, provides that the convening authority "shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party." R.C.M. 502(d), in turn, provides that trial and defense counsel in general courts-martial, and defense counsel in special courts-martial, must be certified under Article 27(b) unless the accused elects individual military or civilian defense counsel in accordance with Article 38(b)(2)-(3).

With respect to detailing of trial and defense counsel to depositions generally, both the statute and the rules need to be updated to reflect current practice, in which trial and defense counsel are detailed to courts-martial by their respective legal service departments, not by the convening authority.

This change would align Article 49 with the counsel qualification requirements of R.C.M. 702(d)(2) and R.C.M. 502(d), and with current practice with respect to the detailing of trial and defense counsel by legal chains of command rather than convening authorities. At the same time, it would preserve the option of the accused to be represented by non-Article 27(b) certified civilian defense counsel at depositions.

Recommendation 49.5: Amend Article 49(d) to replace that subsection's recitation of the situations in which depositions may be used in military proceedings with a more direct reference to the military rules of evidence, consistent with the federal rule.

The current version of Article 49(d) is basically unchanged from how it appeared in 1950, despite the President's adoption of the military rules of evidence in 1980, including M.R.E. 804(a), and despite court rulings in the intervening decades that have significantly narrowed this subsection's scope and effect. The proposed amendment would simplify Article 49(d) and better align the provision with current practice.

The proposed amendment, if adopted, would necessitate a change to M.R.E. 804(a)(6), which currently cross-references to Article 49(d)(2), in order to allow the use of depositions at trial when the deponent is unavailable as a witness due to military necessity or other reasonable cause. This rule change will be considered in Part II of this Report.

Recommendation 49.6: Amend Article 49(e) and (f) by redesignating the two subsections as a single Article 49(d) (Capital Cases), providing that "[t]estimony by deposition may be presented in capital cases only by the defense."

When the UCMJ was enacted, if an offense was punishable by death, the case was classified as "capital" unless the convening authority opted against a capital referral. Under R.C.M. 103(2) and R.C.M. 1004(b)(1), however, a case is not capital unless the convening authority specifically refers the case as capital through special instruction. Because of this change, Article 49(e)'s cross-reference to Article 49(d) is unnecessary.

7. Relationship to Objectives and Related Provisions

This proposal would support the GC Terms of Reference and Article 36 of the UCMJ by conforming Article 49 to current military deposition practice and case law, and by aligning military deposition practice more closely with deposition practices and procedures applicable in federal district court and most state jurisdictions.

This proposal would support MJRG Operational Guidance by providing greater internal consistency among related UCMJ articles, MCM provisions, and other MJRG proposals, including the proposal to expand the pre-referral authorities of military judges.

8. Legislative Proposal

SEC. 711. DEPOSITIONS.

Section 849 of title 10, United States Code (article 49 of the Uniform Code of Military Justice), is amended to read as follows:

"§849. Art. 49. Depositions

"(a) IN GENERAL.—(1) Subject to paragraph (2), a convening authority or a military judge may order depositions at the request of any party.

"(2) A deposition may be ordered under paragraph (1) only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be preserved for use at a court-martial, military commission, court of inquiry, or other military court or board.

"(3) A party who requests a deposition under this section shall give to every other party reasonable written notice of the time and place for the deposition.

"(4) A deposition under this section shall be taken before, and authenticated by, an impartial officer, as follows:

"(A) Whenever practicable, by an impartial judge advocate certified under section 827(b) of this title (article 27(b)).

"(B) In exceptional circumstances, by an impartial military or civil officer authorized to administer oaths by (i) the laws of the United States or (ii) the laws of the place where the deposition is taken.

"(b) REPRESENTATION BY COUNSEL.—Representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under section 827 of this title (article 27). In addition, the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in section 838(b) of this title (article 38(b)).

"(c) ADMISSIBILITY AND USE AS EVIDENCE.—A deposition order under subsection (a) does not control the admissibility of the deposition in a court-martial or other proceeding under this chapter. Except as provided by subsection (d), a party may use all or part of a deposition as provided by the rules of evidence.

"(d) CAPITAL CASES.—Testimony by deposition may be presented in capital cases only by the defense.".

9. Sectional Analysis

Section 711 contains a complete revision of Article 49. Article 49 provides statutory authority for the taking of depositions by the parties of a court-martial; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Consistent with Article 36, the proposed amendments would conform Article 49's substantive provisions, to the extent practicable, to the procedures and principles of law pertaining to depositions applicable in federal district court. These amendments also would conform the statute to the Confrontation Clause. As revised, Article 49 would contain the following provisions:

Article 49(a) would better align military deposition practice under Article 49 with federal and state deposition practice, and with the authority to issue and enforce subpoenas for witnesses under Articles 46 and 47, by ensuring that depositions of prospective witnesses will generally be ordered only when it is likely that the witness's trial testimony otherwise would be lost. By eliminating the reference to Article 32 preliminary hearings, the proposed amendments would ensure that depositions are permitted only for the purpose of preserving testimony for trial, not for pretrial discovery purposes. As amended,

subsection (a) would conform to the proposed Article 30a concerning pre-referral duties of military judges. As amended, the authority to order depositions could be exercised by military judges detailed under Articles 26 or 30a (consistent with the definition of "military judge" proposed under Article 1(10)), as well as military magistrates designated by the detailed military judge under Articles 19 or 30a.

Article 49(a)(3) would replace and clarify the requirement for notice currently contained in subsection (b).

Article 49(a)(4) would replace and update subsection (c), providing greater consistency between Articles 49 and 32 with respect to the qualifications of deposition officers and preliminary hearing officers.

Article 49(b) would replace and update the counsel provisions currently contained in subsection (a), ensuring that the parties at a deposition will be represented by counsel detailed in the same manner as under Articles 27 and 38.

Article 49(c) would update and replace obsolete provisions in subsection (d) concerning the admissibility of depositions as evidence at trial. These changes would reflect the adoption of the Military Rules of Evidence in 1980 and provide greater consistency with federal civilian deposition practice.

Article 49(d) would update and replace subsections (e) and (f) to clarify the prohibition on the use of depositions in capital cases by the government.

Article 50 – Admissibility of Records of Courts of Inquiry
10 U.S.C. § 850

1. Summary of Proposal

This proposal would amend Article 50 to permit sworn testimony from a court of inquiry to be either played from an audiovisual recording or read into evidence when it is otherwise admissible.

2. Summary of the Current Statute

Article 50 concerns the admissibility of records of courts of inquiry in courts-martial and military commissions. Under the statute, authenticated records from courts of inquiry may be read into evidence at a court-martial or military commission if the witness is unavailable at trial and the evidence is otherwise admissible. In capital cases or cases extending to the dismissal of commissioned officers, however, testimony can be read only by the defense.

3. Historical Background

Article 50 was derived from Article 27 of the Articles of War and was consistent with the practice in the Navy prior to the UCMJ's enactment in 1950.[1] At the time, courts of inquiry were used frequently to investigate allegations of officer misconduct.[2] Boards of investigation, where sworn testimony was not taken, were generally used in cases involving enlisted members.[3] The only amendment to Article 50 came in 2006 when Congress excluded the admissibility of courts of inquiry records in a military commission established under 10 U.S.C. § 948a et seq.[4]

4. Contemporary Practice

The President has implemented Article 50 through M.R.E. 804(b)(1), which expressly includes testimony from a court of inquiry within the definition of former testimony that may be admissible when the declarant is found to be unavailable at trial. Although courts of inquiry have a long tradition in the military, they are rarely conducted today, having given way to other investigative and administrative procedures. Because of the infrequent use of

[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1070 (1949).

[2] *Id*.

[3] *Id*. at 1071.

[4] Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(a)(2); 120 Stat. 2600, 2631 (2006).

courts of inquiry, Article 50 is rarely used as a basis for admitting the former testimony of an unavailable declarant.

5. Relationship to Federal Civilian Practice

Article 50 has no corresponding rule in federal civilian criminal practice. Fed. R. Evid. 804(b)(1), however, does provide a hearsay exception for former testimony nearly identical to the exception contained in M.R.E. 804(b)(1).[5]

6. Recommendation and Justification

Recommendation 50: Amend Article 50 to permit sworn testimony from a court of inquiry to be played, in addition to read, into evidence in courts-martial and military commissions not established under 10 U.S.C. § 948a et seq. when it is otherwise admissible under the rules of evidence.

As noted, use of courts of inquiry today is extremely rare. When they are used, however, the manner of presenting the evidence to a factfinder at a court-martial should not be limited to the reading of a transcript. Allowing an authenticated audio recording to be played for the members allows for more flexibility in the manner of presentation and is more efficient.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal supports the MJRG operational guidance by promoting efficiency in the court-martial process.

[5] FED. R. EVID. 804(b)(1) (providing for the admissibility at trial of prior sworn testimony, subject to cross examination by the accused and submitted at trial when the declarant is "unavailable"). In practice this essentially extends only to testimony from prior trials, as grand jury testimony does not qualify as the witnesses at a grand jury are not subject to cross-examination. *See* FED. R. CRIM. P. 6(d)(1) (providing that only the grand jurors, testifying witness, prosecutor, and court reporter, and court interpreter (if necessary) are authorized to be present during grand jury proceedings).

8. Legislative Proposal

SEC. 712. ADMISSIBILITY OF SWORN TESTIMONY BY AUDIOTAPE OR VIDEOTAPE FROM RECORDS OF COURTS OF INQUIRY.

(a) IN GENERAL.—Section 850 of title 10, United States Code (article 50 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) AUDIOTAPE OR VIDEOTAPE.—Sworn testimony that—

"(1) is recorded by audiotape, videotape, or similar method; and

"(2) is contained in the duly authenticated record of proceedings of a court of inquiry;

is admissible before a court-martial, military commission, court of inquiry, or military board, to the same extent as sworn testimony may be read in evidence before any such body under subsection (a), (b), or (c).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§850. Art. 50. Admissibility of sworn testimony from records of courts of inquiry".

9. Sectional Analysis

Section 712 would amend Article 50 to update the statute to permit sworn testimony from a court of inquiry to be played from an audiovisual recording if the deposed witness is unavailable at trial and the evidence is otherwise admissible under the rules of evidence.

Article 50a – Defense of Lack of Mental Responsibility
10 U.S.C. § 850a

1. Summary of Proposal

This proposal would align Article 50a with the changes proposed in Article 16. Part II of the Report will consider whether any changes are needed in the rules implementing Article 50a.

2. Summary of the Current Statute

Article 50a defines the defense of "lack of mental responsibility." This defense is an affirmative defense. In order to succeed, the accused must prove by "clear and convincing" evidence that the accused: (1) suffered a severe mental disease or defect; and (2) as a result, was unable to appreciate the nature and quality or the wrongfulness of the acts. After the accused raises this defense, the members may find the accused guilty, not guilty, or not guilty only by reason of lack of mental responsibility. The statute requires a majority of the panel to find the accused is "not guilty only by reason of lack of mental responsibility." In a case tried before a military judge only, the military judge determines that the defense of lack of mental responsibility has been established. In a case tried with members, the military judge instructs the members on the defense. In a court-martial tried with members but no military judge, the President of the panel instructs the other members as to the defense.

3. Historical Background

For most of American history, the insanity defense was governed by the *M'Naghten* rule from England. This defense required a mental disease or defect which caused the defendant to either not know the nature of a committed act, or to not know that the act was wrong. This defense was judicially adopted and defined in most American jurisdictions, including the military's case law. Over time, many jurisdictions expanded this defense to include any act committed because of the accused's mental defect, or any act which was an "irresistible impulse." In 1984, Congress passed the Insanity Defense Reform Act[1]. The Act required the mental defect to be "severe" and eliminated the "irresistible impulse" defense. The Act also made the defense an affirmative defense, which placed the burden on the accused to prove lack of mental responsibility. Shortly after the Act was passed, Article 50a was added to the

[1] 18 U.S.C. § 17 (1984).

UCMJ.[2] Article 50a essentially mirrors the requirements of the Insanity Defense Reform Act.

4. Contemporary Practice

The defense of lack of mental responsibility is not frequently raised and there are few reported military appellate cases addressing the defense.[3] The military courts recognize that, while lack of mental responsibility is an affirmative defense which the accused has the burden of proving, if evidence is introduced which calls into question the mens rea of the accused on a specific intent element of an offense, the government has the burden of proving specific intent.[4] In *United States v. Berri*, the Court of Military Appeals held that "[i]f admissible evidence suggests that the accused, for whatever reason, including mental abnormality, lacked mens rea, the factfinder must weigh it along with any evidence to the contrary."[5] Thus, if a specific mens rea is an element of a crime, the government must prove it as they would any other element. The President has implemented Article 50a through R.C.M. 916(k)(2). The article also details procedures for instructing members in cases where a special court-martial has been convened without a military judge. Under longstanding practice among all the services, such courts-martial are extremely rare because a military judge is typically detailed to every general and special court-martial.

5. Relationship to Federal Civilian Practice

Although Article 50a is essentially identical to the provisions of the Insanity Defense Reform Act, federal and military courts have taken different approaches to diminished mental capacity as a way to negate mens rea as an element of an offense. The military courts allow evidence of partial mental responsibility to negate the mens rea of specific intent crimes.[6] In *United States v. Berri*, the U.S. Court of Military Appeals cited to cases in the Eleventh and Third Circuits for this rule.[7] Not all of the federal circuits have followed the Eleventh and Third Circuits.[8]

6. Recommendation and Justification

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[2] NDAA FY 1987, Pub. L. No. 99-661, tit. VIII, 100 Stat. 3905; 10 U.S.C. § 850a.

[3] *See* Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 12 (2007) (observing that the insanity defense is raised in 1% of all felony cases but successful in less than 25% of those).

[4] United States v. Berri, 33 M.J. 337, 342-43 (C.M.A. 1991).

[5] *Id.*

[6] *Id*.

[7] *See* United States v. Cameron, 907 F.2d 1051 (11th Cir. 1990); United States v. Pohlot, 827 F.2d 889, 897 (3d. Cir. 1987).

[8] *See* FEDERAL JURY PRACTICE AND INSTRUCTIONS, 1A FED. JURY PRAC. & INSTR. § 19:03 (6th ed.).

Recommendation 50a: Amend Article 50a to delete provisions pertaining to courts-martial without a military judge, with no substantive changes.

In view of the well-established case law addressing Article 50a, only conforming changes are necessary. Article 50a mirrors federal law and both are generally similar in practice.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 50a.

7. Relationship to Objectives and Related Provisions

Article 50a is a stable area of military criminal justice practice and mirrors federal law.

8. Legislative Proposal

SEC. 713. CONFORMING AMENDMENT RELATING TO DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

Section 850a(c) of title 10, United States Code (article 50a(c) of the Uniform Code of Military Justice), is amended by striking ", or the president of a court-martial without a military judge,".

9. Sectional Analysis

Section 713 would amend Article 50a to conform the statute to the proposed changes in Article 16 to eliminate special courts-martial without a military judge.

Article 51 – Voting and Rulings
10 U.S.C. § 851

1. Summary of Proposal

This proposal would align Article 51 with the changes proposed in Article 16. Part II of the Report will consider changes in the rules implementing Article 51 necessitated by the proposed statutory amendments.

2. Summary of the Current Statute

Article 51 concerns voting by the members of a court-martial and rulings by the military judge. Article 51(a) prescribes the procedures for the members of a general or special court-martial to vote by secret written ballot on the findings and sentence. Article 51(b) provides that the military judge or, in a special court-martial without a military judge, the President of the court-martial panel, shall issue final rulings upon all questions of law and all interlocutory questions arising during the proceedings. Article 51(c) lists required instructions pertaining to presumptions of innocence and the government's burden of proving guilt beyond a reasonable doubt. And Article 51(d) exempts courts-martial tried by military judge alone from the requirements of subsections (a)-(c).

3. Historical Background

With the exception of the change from "law officer" to "military judge" in 1968, Article 51 has remained relatively unchanged since the UCMJ was enacted in 1950.[1]

4. Contemporary Practice

The President has implemented Article 51 through R.C.M. 920 (Instructions on findings), 921 (Deliberations and voting on findings), and 922 (Announcement of findings), which provide additional rules and procedures for voting by secret ballot, rulings by the military judge, the limited role of the members, members instructions prior to findings, and trial by a military judge alone. The rules also provide specific instructions for these functions in cases where a special court-martial has been convened without a military judge. Under longstanding practice among all the services, such courts-martial are extremely rare because a military judge typically is detailed to every general and special court-martial.

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. *See* Military Justice Act of 1968, Pub. L. No. 90-632, § 2(2)-(21), 82 Stat. 1335, 1335-1340 (1968) (replacing "law officer" with "military judge," reflecting the introduction of military judges into the UCMJ).

5. Relationship to Federal Civilian Practice

The rules and procedures pertaining to deliberations and voting under Article 51 and the Rules for Courts-Martial differ in several ways from federal civilian practice. First, due to the differences in rank between court-martial members, Article 51 requires that all voting be by secret written ballot. This helps to preserve anonymity and minimize the potential for unlawful command influence in deliberations. In federal civilian practice, a party may request to poll the jury after the verdict is announced and determine each juror's individual vote in order to ensure unanimity.[2] Another area of difference is with members (or jury) instructions, which tend to be more detailed and uniform in military practice than in federal civilian practice. Article 51 gives specific members instructions that must be given in each case, and the Military Judge's Benchbook provides suggested instructions on elements of offenses, how to view evidence, defenses, and other matters.[3] In federal civilian practice, jury instructions may be given when specifically requested by a party, but they are not required.[4] Each circuit has pattern jury instructions proposed by a Committee on Pattern Jury Instructions.[5] When a judge fails to give a requested instruction, the courts will look at the totality of the circumstances to determine whether an accused received a constitutionally fair trial.[6]

With respect to judicial rulings before findings, military practice and federal civilian practice are closely aligned. Both require the presiding judge to rule on motions, questions of law, excusal requests, and other related matters. While the military technically allows the president of a special court-martial without a military judge to issue rulings, this procedure is not used in practice.

6. Recommendation and Justification

Recommendation 51: Amend Article 51 to delete references and rules pertaining to courts-martial without a military judge.

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[2] *Compare* FED. R. CRIM. P. 31(d) (Jury Poll) *with* R.C.M. 922(e) (Polling prohibited).

[3] MILITARY JUDGES' BENCHBOOK, DA PAM 27-9 (Jan. 1, 2010).

[4] FED. R. CRIM. P. 30.

[5] *See, e.g.*, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASSOCIATION, FIFTH CIRCUIT (2012).

[6] *See* Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (failure to give a requested instruction on the presumption of innocence must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial); *cf.* United States v. Carruthers, 64 M.J. 340, 346 (C.A.A.F. 2007) ("We apply a three-pronged test to determine whether the failure to give a requested instruction is error: '(1) the requested instruction is correct; (2) it is not substantially covered in the main instruction; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation.'") (citation omitted).

This proposal would conform Article 51 to longstanding practice and the proposed changes in Article 16.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal is related to the proposed changes in Article 16.

8. Legislative Proposal

SEC. 714. VOTING AND RULINGS.

Section 851 of title 10, United States Code (article 51 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking ", and by members of a court-martial without a military judge upon questions of challenge," in the first sentence;

(2) in subsection (b)—

(A) by striking "and, except for questions of challenge, the president of a court-martial without a military judge" in the first sentence; and

(B) by striking ", or by the president" in the second sentence and all that follows through the end of the subsection and inserting "is final and constitutes the ruling of the court, except that the military judge may change a ruling at any time during trial."; and

(3) in subsection (c), by striking "or the president of a court-martial without a military judge" in the matter before paragraph (1).

9. Sectional Analysis

Section 714 would amend Article 51, which concerns voting by members of a court-martial and rulings by military judges. These amendments would remove statutory references to courts-martial without a military judge, reflecting the proposed amendments to Article 16 to require the detailing of a military judge in all general and special courts-martial. The amendments would retain current law and procedures for voting on the findings and sentence, and for rulings by the military judge, other than those aspects of Article 51 and the implementing rules which specifically concern courts-martial without a detailed military judge.

Article 52 – Number of Votes Required
10 U.S.C. § 852

1. Summary of Proposal

This proposal, in conjunction with the recommendation for fixed panel sizes under Article 16, would eliminate inconsistencies and uncertainties in court-martial voting requirements by standardizing the requirements for each type of court-martial. The proposal also would make conforming changes to align Article 52 with the proposed changes in Articles 16, 25a, and 53.

2. Summary of the Current Statute

Article 52 requires that for an accused to be convicted of an offense there must be a concurrence of all the members in cases where death is required, and two-thirds of the members for all other offenses. The statute requires unanimity for a death sentence, three-fourths concurrence for a sentence to confinement for more than ten years, and a two-thirds concurrence for all other sentences. A vote for reconsideration of a finding of guilt requires more than one-third of the panel for non-capital offenses and any one member may move for reconsideration of a finding of guilt in a capital case. All other matters require a majority vote.[1] Finally, Article 52 discusses voting on issues pertaining to special courts-martial without a military judge, such as members voting on challenges to another member and motions to suppress evidence.

3. Historical Background

Under the original Articles of War, a majority vote of a thirteen-person court-martial panel was required for conviction.[2] After the American Revolution, and in order to account for the limited size of America's military forces, the Articles of War and the Articles for the Government of the Navy adopted the practice of seating five to thirteen officers in general courts-martial, with regimental courts-martial (or "summary" courts-martial in the Navy) fixed at three members.[3] In 1920, amendments to the Articles of War increased the majority vote requirements for a conviction to a three-fourths requirement in cases where death was mandatory and a two-thirds requirement in all other cases.[4] When Congress

[1] For example, the military judge may instruct the members that the President of the panel should determine the order of which specification to vote on first, unless a majority of the panel objects. *See* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, ¶2-5-14 (15 Sept. 2002) (C2, 1 July 2003).

[2] AW XXXVII of 1775.

[3] *See, e.g.*, AW 5 and 6 of 1916; *see also* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 3-11 (1998).

[4] AW 43 of 1920.

enacted the UCMJ in 1950, it kept in place the two-thirds voting requirement for most cases, but added a requirement of unanimity for death sentences and a requirement for three-fourths of the members to agree in order to adjudge sentences over 10 years. Since military judges were introduced to the system in 1968, the practice has evolved such that military judges are detailed to all special courts-martial, rendering obsolete the provisions of Article 52 directed at a special court-martial without a military judge.

4. Contemporary Practice

Under current law, a special court-martial can consist of as few as three members. However, a special court-martial frequently will include more members because of uncertainty as to the number who will remain after excusals and challenges. A general court-martial may consist of as few as five members, but for the same reasons often will have more than five members. Because there is no maximum number of members in general and special courts-martial, the number of members who are impaneled can fluctuate from case to case. Because a concurrence of at least two-thirds of the panel is required for a conviction, the actual percentage necessary for conviction changes with the size of the panel. The following table shows the varying percentages required for conviction in typical courts-martial.[5]

# of members	3	4	5	6	7	8	9	10	11	12	13
% required for conviction	67%	75%	80%	67%	71%	75%	67%	70%	73%	67%	69%

Panel members also vote on sentencing. The voting requirements range from unanimous (for a death sentence) to a minimum of two-thirds. A sentence of more than ten years confinement requires the concurrence of at least three-fourths of the panel. The following table shows the necessary percentages required for sentences in typical courts-martial.

# of members	3	4	5	6	7	8	9	10	11	12	13
% required for sentence ≤ 10 years	67%	75%	80%	67%	71%	75%	67%	70%	73%	67%	69%
% required for > 10 years	NA	NA	80%	83%	86%	75%	78%	80%	82%	75%	77%

[5] Because there currently is no maximum number of members who may sit on a panel, this table is not exhaustive.

5. Relationship to Federal Civilian Practice

Civilian practice and military practice concerning voting differ with respect to minimum requirements. In federal civilian practice, all findings by a jury must be unanimous. In capital cases, a jury must also unanimously agree to a sentence of death. The federal district court judge is the sentencing authority in all other cases. There are no federal courts without a trial judge or magistrate. Every state except Oregon and Louisiana requires unanimous verdicts. Those two states require at least ten of twelve jurors for a conviction.[6]

6. Recommendation and Justification

Recommendation 52.1: Amend Article 52 to require concurrence of at least three-fourths of the members present.

With the fixed panel sizes established under the proposal for Article 16, this proposal would set the voting percentage for a conviction to 75% (e.g., 6 of 8 at general courts-martial; 3 of 4 at special courts-martial).

Recommendation 52.2: Amend Article 52 to require concurrence of at least three-fourths of the members present on offenses in a case referred for trial as a capital case, where there was not a unanimous finding of guilty.

In order for the accused to be sentenced to death, the panel must be unanimous on both findings and sentence. The panel in a capital case first considers the findings on both capital and non-capital offenses that have been referred to the court-martial. For non-capital offenses in such a case, this proposal would require concurrence of at least three-fourths of the members present to convict. With respect to a capital offense, concurrence of at least three-fourths of the members present would be sufficient for a conviction, but only unanimous concurrence by all members present on findings for a capital offense would authorize the court-martial to consider the death penalty on sentencing.

Recommendation 52.3: Amend Article 52(c) to eliminate the language concerning "tie vote[s]" on challenges, motions, and other questions, which is applicable only to special courts-martial without a military judge, and which would no longer be necessary given the proposal in Article 16 to eliminate these members-only courts-martial.

This is a conforming change to align Article 52 with the proposed amendments to Article 16.

Recommendation 52.4: Amend Article 52 to conform the statute to the proposal in Article 53 for judicial sentencing in all non-capital cases, and member sentencing in capital cases with respect to sentences of death and life without parole.

This proposal would conform Article 52 to the proposal in Article 53 for judge-sentencing in all non-capital cases and members-sentencing in capital cases with respect to the sentences of death and life without parole.

[6] Or. Rev. Stat. § 136.450 (2013); La. Code Crim. Proc. Ann. art. 782 (2013).

With respect to sentences of death and life without parole, the proposed amendments retain the current requirement for unanimity as to the death sentence, and reflect the current three-fourths floor for life without parole by requiring a three-fourths vote for other sentences.

This proposal conforms to federal civilian law, in which the judge determines the sentence in capital cases where the jury does not vote for death or life without parole.[7]

7. Relationship to Objectives and Related Provisions

These proposed changes would align the court-martial voting process with the standardized panel size and judicial sentencing provisions in the proposed amendments to Article 16 (setting a fixed number of members on a courts-martial panel and requiring a military judge at all general and special courts-martial), Article 25a (fixing the number of members in a capital case at twelve), and Article 53 (adding a requirement that all sentences except for death will be determined by the military judge).

This proposal supports the GC Terms of Reference by incorporating, insofar as practicable, voting requirements applicable in U.S. district court.

8. Legislative Proposal

SEC. 715. VOTES REQUIRED FOR CONVICTION, SENTENCING, AND OTHER MATTERS.

Section 852 of title 10, United States Code (article 52 of the Uniform Code of Military Justice), is amended to read as follows:

"§852. Art. 52. Votes required for conviction, sentencing, and other matters

"(a) IN GENERAL.—No person may be convicted of an offense in a general or special court-martial, other than—

"(1) after a plea of guilty under section 845(b) of this title (article 45(b));

"(2) by a military judge in a court-martial with a military judge alone, under section 816 of this title (article 16); or

[7] 18 U.S.C. § 3594.

"(3) in a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken.

"(b) LEVEL OF CONCURRENCE REQUIRED.—

"(1) IN GENERAL—Except as provided in subsection (a) and in paragraph (2), all matters to be decided by members of a general or special court-martial shall be determined by a majority vote, but a reconsideration of a finding of guilty or reconsideration of a sentence, with a view toward decreasing the sentence, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence.

"(2) SENTENCING.—A sentence of death requires (A) a unanimous finding of guilty of an offense in this chapter expressly made punishable by death and (B) a unanimous determination by the members that the sentence for that offense shall include death. All other sentences imposed by members shall be determined by the concurrence of at least three-fourths of the members present when the vote is taken.".

9. Sectional Analysis

Section 715 would amend Article 52 concerning the number of votes required for the findings in members cases, and for the findings and sentence in capital cases. Under current law, because the requirement for a two-thirds vote on the findings (and on most sentences) in Article 52 establishes a floor, not a fixed requirement, none of the parties or the public knows at the outset of a court-martial how many votes will be required for a conviction. The percentage required for a conviction and for a specific sentence can be affected significantly by the number of members detailed to a court-martial and the number of

members removed through excusal, challenges for cause, and peremptory challenges. As a result, it is not unusual to see variations in voting requirements ranging from 67 percent to 80 percent of the members of the court-martial panel. The proposed amendments, in conjunction with the proposal for standard panel sizes under Article 16, would standardize the voting requirement in each type of court-martial at three-fourths (75 percent) in non-capital members cases, and unanimous on the findings and the sentence in capital cases. The proposal also would make conforming changes to align Article 52 with the proposed changes in Articles 16, 25a, and 53 with respect to capital cases and judge-alone sentencing. Implementing rules would address the procedures concerning voting on sentences of death, life without the possibility of parole, and other lawful sentences.

Article 53 – Court to Announce Action
10 U.S.C. § 853

1. Summary of Proposal

This proposal would amend Article 53 to provide for judicial sentencing for all non-capital offenses. For capital offenses, the panel members would decide whether the accused should be sentenced to death, life without eligibility for parole, or to a lesser sentence adjudicated by the military judge. This proposal has been developed in conjunction with this Report's recommendations to: establish "segmented sentencing"—a sentence adjudged for each offense for which an accused is convicted; develop sentencing parameters and criteria to guide judicial discretion in sentencing while fashioning an individualized sentence for each offender; modernize military appellate practice; enhance the selection criteria for military judges; and establish minimum tour lengths for military judges. Taken together, these proposals present a significant opportunity to enhance transparency in military sentencing. The proposals are designed to facilitate sentencing consistency in a manner that permits each sentence to be tailored to address the specific offense and the specific offender.

2. Summary of the Current Statute

Article 53 requires a court-martial to announce its findings and sentence to the parties as soon as they are determined. The sentence is determined by either a panel or a military judge, depending on the accused's forum selection. Article 16 provides that a general or special court-martial may be composed of a military judge with no members, but only if the accused formally requests such composition before the court is assembled and the military judge approves.

3. Historical Background

Under the Articles of War, courts-martial were composed solely of members, there were no judges, often no counsel, and there was no separate sentencing proceeding following the announcement of findings.[1] Instead, the court deliberated on the findings and sentence at the end of the trial and announced them at the same time.[2] To determine an appropriate sentence, the members were instructed (by guidance contained in the MCM) to consider

[1] *See, e.g.*, AW 5, 6, and 29 of 1920; MCM 1921, ¶294 (explaining that votes on findings are immediately followed, in the event of a conviction, by votes on sentencing). For an in depth discussion of 19th century court-martial sentencing practice, see WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 278-80 (photo reprint 1920) (2d ed. 1896). *See generally* Capt. Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986); Maj. James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994).

[2] *See* MCM 1921, ¶294; MCM 1943, ¶77 (explaining, in effect, that findings and sentencing arguments are made by counsel at the close of the case on the merits), ¶80b (discussing sentencing rules), ¶81 (explaining that the findings and sentence on a charge are announced at the same time, in open court).

the accused's background and the goals of general deterrence, discipline, and uniformity in sentencing, as well as the nature and circumstances of the offense.[3] If the court's judgment was for acquittal on all charges and specifications, it announced its findings immediately; in all other cases, the announcement of findings and sentence was left to regulations.[4] In Navy practice, the court's findings and sentence were not announced until after the first reviewing authority had completed its action.[5] The drafters of the UCMJ felt it appropriate that the accused be informed of the outcome of the trial as soon as possible, regardless of the specific findings and sentence, so they made this practice a uniform requirement in Article 53.[6] The change was adopted without objection, and Article 53 has not been significantly amended since its enactment.[7]

The rules providing for a separate sentencing proceeding directly following trial on the merits were first established in the 1951 MCM, and have evolved since then.[8] At first, these rules generally allowed the parties to present "appropriate matter to aid the court in determining the kind and amount of punishment to be imposed."[9] However, the government's ability to offer evidence in aggravation was limited: it could present aggravating circumstances of the offense that were not introduced on the merits, but only in guilty plea cases.[10] Evidence of the accused's prior court-martial convictions was limited to the previous three years or the current service enlistment, and evidence of uncharged misconduct, prior arrests, civil convictions, and other criminal history information was

[3] MCM 1949, ¶80a. *See also* MCM 1928, ¶80 (instructing the members to consider former discharges, prior convictions, and circumstances that tended to aggravate, mitigate, or extenuate either the offense or the collateral consequences of the offense); MCM 1917, ¶342 (instructing members that "the best interest of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desire results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required.").

[4] AW 29 of 1920.

[5] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1083 (1949).

[6] *Id*.

[7] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[8] MCM 1951, ¶75.

[9] *Id.*, ¶75*a*.

[10] *Id.*, ¶75*b*.3.

strictly prohibited, even when the accused was responsible for introducing it.[11] Although the relevance of such information to the goals of sentencing was generally acknowledged, the use of such information was deemed inappropriate in the military setting where court-martial members—not a judge, as in most civilian systems—determined the accused's sentence, and where the risk of confusing the members and prejudicing the accused was acute.[12] Under the new rules, the accused could make an unsworn statement, and the law officer could relax the rules of evidence for the accused's presentation of extenuation and mitigation evidence.[13] The government's sentencing case, however, was strictly limited by the rules of evidence, even in rebuttal.[14]

In 1968, Congress created the position of military judge and amended Article 16 to provide for general and special courts-martial composed of a military judge and panel members. As amended, the accused could elect to be tried and sentenced by a military judge alone, subject to the military judge's approval.[15] Subsequently, the President modified presentencing procedures in the MCM to allow for argument by counsel as to the appropriate sentence;[16] and the next year, a rule was added to allow the trial counsel to present "any personnel records" of the accused when sentencing was before a military judge without members.[17] The Court of Military Appeals later restricted the practice of providing complete personnel records to the military judge, noting that "sentencing in the federal civilian courts is based on statutes not yet found applicable to courts-martial," and the decisions reflected ongoing concerns about the inherent risks of allowing this type of information into a sentencing system that generally, if not always, relied on members to determine the accused's sentence.[18]

The rules concerning sentencing evidence began to expand in the 1980s. Beginning in 1981, the military judge was allowed to keep the rules of evidence relaxed for the government in rebuttal, and evidence of civil convictions could be offered.[19] In 1982, the

[11] *Id.* ¶75*b*.2; *see, e.g.*, United States v. Averette, 38 C.M.R. 117 (C.M.A. 1967) (error for the judge not to give a limiting instruction after accused admitted a civilian conviction during a sworn statement).

[12] MCM, App. 21 (R.C.M. 1001, Analysis).

[13] *Id.*, ¶75*c*.

[14] *Id.*, ¶75*d*.

[15] Article 16 (1968-current).

[16] MCM 1968, ¶75*e*.

[17] MCM 1969, ¶75*d*; *see* United States v. Boles, 11 M.J. 195, 198 n.5 (C.M.A. 1981).

[18] *Id. See also* United States v. Warren, 10 M.J. 603, 606 (A.F.C.M.R. 1980) (Kastl, J., concurring) ("[I]t is one thing to permit a trained judge to consider an accused's false testimony in reaching a sentence . . . but it is quite a different matter to permit a court-martial consisting of members to do this."); Lovejoy, *supra* note 1, at 36 ("The susceptibility of court members requires the military judge to assume a proactive role in protecting members from evidence that may 'unduly arouse the members' hostility or prejudice against an accused.'") (quoting *Boles*, 11 M.J. at 201).

[19] MCM 1969, ¶75c-d, *amended by* Exec. Order 12315, 3 C.F.R. 163 (1982).

Court of Military Appeals overruled prior case law that limited the government's ability to introduce aggravation evidence to guilty plea cases.[20] Three years later it allowed for the government to introduce uncharged misconduct directly related to the offense in all cases.[21] Beginning in 1984, the government was allowed to introduce evidence concerning the accused's rehabilitative potential in the form of opinion testimony.[22] Subsequent rule changes have clarified the definition of "conviction" and the aggravating nature of hate crimes, and permit the introduction of victim impact evidence.[23] Otherwise, the rules for presentencing procedures today are similar to when R.C.M. 1001 was first adopted in 1984.

As the rules for the presentencing proceeding evolved, so did the rules for determining an appropriate sentence. In 1957, the Court of Military Appeals prohibited the use of the MCM by the members during their deliberations on findings and sentence.[24] In 1959, the Court of Military Appeals held that the standard instruction to members that "sentences should . . . be relatively uniform throughout the armed forces," was "impractical, confusing, and of such doubtful validity [it] should not be given to the court-martial members."[25] Noting that the law prohibited providing the members other cases for comparative purposes, the court stated the "principle is founded on the hypothesis that accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment."[26] This focus on individualized sentencing became the bedrock of military sentencing philosophy, and, in 1969, the President removed "sentence uniformity" from the list of sentencing goals in the Manual.[27]

Subsequent editions of the MCM have not included guidance to members on how to arrive at an appropriate sentence. This reflects two factors. First, as rehabilitation replaced retribution as the primary sentencing theory during the first three quarters of the twentieth century, individualized sentencing was prioritized over uniformity as a

[20] United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982).

[21] United States v. Martin, 20 M.J. 227, 230 (C.M.A. 1985).

[22] R.C.M. 1001(b)(5).

[23] *See* R.C.M. 1001(b)(3)-(4).

[24] United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957). The court stated its grounds for rejecting the practice of members consulting the Manual for guidance in sentence determination as follows: "We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the *Manual*, indiscriminately rejecting and applying a myriad of principles—judicial and otherwise—contained therein. The consequences that flow from such a situation are manifold. . . . It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer. . . . [T]he great majority of court members are untrained in the law. A treatise on the law in the hands of a nonlawyer creates a situation which is fraught with potential harm, especially when one's life and liberty hang in the balance." *Id.* at 216-17.

[25] United States v. Mamaluy, 27 C.M.R. 176, 180 (C.M.A. 1959).

[26] *Id.*

[27] MCM 1969, ¶76.

sentencing goal.[28] Second, there was increasing concern that influencing, or attempting to influence, the discretion of the sentencing authority in adjudging a sentence was *per se* improper.[29] To some extent, this lack of sentencing guidance has been assuaged through model instructions suggested in the Military Judges' Benchbook and supplemental member instructions under R.C.M. 1005.

In 1983, a year before the enactment of the Federal Sentencing Guidelines, Congress directed the Secretary of Defense to establish a commission to study and make recommendations to Congress regarding a number of military justice issues. One of the issues assigned to this Advisory Commission was whether the sentencing authority in court-martial cases should be exercised by the military judge in all non-capital cases to which a military judge has been detailed.[30] The Commission ultimately recommended no change to the existing system, noting, among other reasons, that "participation of military members in court-martial punishment decisions . . . fosters understanding of military justice by all servicemembers and belief in the fairness of the system."[31]

In the three decades since the Advisory Commission issued its report, practitioners and scholars have continued to recommend revisiting the issue of judge-alone sentencing.[32] As noted in 1998 by Brigadier General John S. Cooke, the Chief Judge of the Army Court of Criminal Appeals:

> Since [the Advisory Commission's Report], we have seen the movement in civilian courts toward greater uniformity in sentencing, and the nature of our caseload has continued to swing toward crimes against society, not just against the military. . . . [J]udge alone sentencing would bring, I am confident, greater uniformity and consistency. It also would make it easier to present more information at the sentencing phase, without fear that it would be used improperly. Certainly, it would be more efficient, both in terms of the court-martial itself, and by freeing the members for other duties.[33]

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[28] *See generally* Vowell, *supra* note 1; *see also* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE § 26.3(a) (3d ed. 2013).

[29] Vowell, *supra* note 1, at 137 ("Since the Court of Military Appeals had already prohibited consideration of most of these guides (and the members had never been given any guidance on how to apply them), their elimination from the Manual had little direct impact on sentencing. There was a concern, almost bordering on paranoia, that anything which could influence the members in their sentencing decision was improper.").

[30] REPORT OF THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION 2 (1984) [hereinafter ADVISORY COMMISSION REPORT].

[31] *Id.* at 6.

[32] *See, e.g.*, Colin Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009).

[33] Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 20 (1998).

In 2014, the Comparative Systems Subcommittee of the Congressionally mandated Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) recommended that military judges should be the sole sentencing authority in sexual assault and other non-capital cases:

> Forty-four states and the federal criminal justice system all require judges, not juries, to impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. This change has the potential to improve sentencing consistency and fairness without the imposition of sentencing guidelines because of the advantage in experience and expertise that military judges have over panel members. It will also reduce the administrative burden of panel member sentencing and help to minimize the perception of command influence.[34]

4. Contemporary Practice

The President has implemented Article 53 through R.C.M. 922 and 1007, and has provided the rules for sentencing in Chapter X of the Rules for Courts-Martial. Currently, the rules do not include separate procedures for sentencing by members and sentencing by the military judge. R.C.M. 1001 and 1002 provide presentencing procedures and the rules for sentence determination applicable in all cases, and R.C.M. 1004 provides additional rules and procedures applicable only in capital cases.

Under current law, the sentencing authority—either members or, in most guilty plea cases, a military judge—exercises broad discretion to determine an appropriate sentence, constrained by the maximum punishments for offenses prescribed by the President, and any statutory provisions concerning mandatory minimum sentences.[35] Guidance on how to exercise discretion is very limited.[36] In members cases, R.C.M. 1005 requires the military judge to give the members "appropriate instructions on sentence," and required instructions include: guidance on the maximum punishment; guidance on the effect of any sentence on the accused's entitlement to pay and allowances; guidance on the procedures for deliberation and voting; advice that the members are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and instructions that the members should consider all matters in extenuation, mitigation, and aggravation.[37]

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[34] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, ANNEX, REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE 9 (May 2014). This recommendation of the subcommittee was not adopted by the full Panel. Instead, the Response Systems Panel recommended that "The Secretary of Defense direct a study to analyze whether changes should be made to . . . make military judges the sole sentencing authority in sexual assault and other cases in the military justice system." *Id.* at 51 (Recommendation 122).

[35] *See* R.C.M. 1002.

[36] *See* Maj. Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 171 (2000) ("Despite having a wide range of sentencing options available, the sentencing authority has little guidance on how to actually form a sentence.").

[37] R.C.M. 1005(e)(1)-(5). *See also* R.C.M. 1005(a) (Discussion) (noting that the judge's instructions "should be tailored to the facts and circumstances of the individual case.").

The Military Judges' Benchbook provides judges with additional guidance on how to craft supplemental instructions.[38] The Benchbook recommends a general statement of the purposes of punishment and suggests that military judges complete their sentencing instructions to members with a brief reiteration of the overall purposes of military law: "In arriving at your determination, you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society."[39] However, the Benchbook does not instruct members (or provide guidance to a military judge who is adjudging a sentence) how the general purposes of punishment and the overall purposes of military law should inform their consideration of the evidence introduced during the two phases of the trial. Furthermore, the Benchbook does not instruct members how to connect the nature of the particular offense and the background of the particular offender to these purposes in a meaningful way.[40]

The sentencing proceeding prescribed under R.C.M. 1001 is an adversarial proceeding that largely resembles a trial on guilt or innocence. R.C.M. 1001 is divided into seven subparts, covering the sequence of the proceeding, matters to be presented by the prosecution and defense, rebuttal, production of witnesses, and argument. The rule limits the evidence that the government can present in aggravation to "aggravating circumstances directly relating to or resulting from the [adjudged] offenses" including the impact of the offense on any victim and evidence of adverse impact on the mission of the command.[41] The trial counsel may introduce evidence of prior convictions of the accused under R.C.M. 1001(b)(3), but the scope of other evidence of criminal history, such as arrests, is limited.[42] The rule allows the military judge to relax the rules of evidence, upon defense request, during the defense presentation of evidence and the government has a similar allowance in its rebuttal case if

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[38] *See* MILITARY JUDGES' BENCHBOOK, DA PAM 27-9 (Jan. 1, 2010) [hereinafter BENCHBOOK], at § 2-5-23 (laying out the so-called *Wheeler*-factors to help the military judge specifically tailor his/her sentencing instructions to the facts of the case). United States v. Wheeler, 38 C.M.R. 72, 75-76 (C.M.A. 1967).

[39] B ENCHBOOK, *supra* note 38, at § 2-5-24.

[40] *See* BENCHBOOK, *supra* note 38, at §§ 2-5-21 and 2-6-9 ("You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, *rests solely within your discretion*.") (emphasis added); Immel, *supra* note 36, at 195 ("While the sentencing authority receives instruction that they may consider rehabilitation, punishment, deterrence, and protection of society when fashioning an appropriate sentence, neither the *Manual for Courts-Martial* nor the *Judges' Benchbook* provides any concrete guidance on how the sentencing goals are to be applied in order to fulfill the purposes of military law.").

[41] R.C.M. 1001(b)(4) (emphasis added). *See* United States v. Rust, 41 M.J. 472, 478 (C.A.A.F. 1995) ("The phrase 'directly relating to or resulting from the offenses' imposes a 'higher standard' than 'mere relevance.'") (quoting United States v. Gordon, 31 M.J. 30, 36 (C.M.A. 1990)); United States v. King, 30 M.J. 334 (C.M.A. 1990) (government cannot offer evidence that accused appeared before the United States Disciplinary Barracks disciplinary board on 19 occasions while confined because it is not directly related to charged offense).

[42] MCM, App. 21 (R.C.M. 1001, Analysis).

the rules were relaxed for the defense.[43] During the defense case, the accused may make a sworn statement, an unsworn statement, or both.[44] The defense may also choose to offer no evidence in sentencing. During argument, the trial counsel may relate the specific sentence argued for to the generally accepted sentencing goals of rehabilitation, specific and general deterrence, social retribution.[45] Both trial and defense counsel may recommend a particular sentence to the members or the judge in their arguments on sentence.

5. Relationship to Federal Civilian Practice

Although there is no specific rule concerning the announcement of findings and sentence in U.S. district courts, federal civilian practice and military practice in this area are generally consistent.[46] The overall goals of sentencing in the federal civilian system and the military justice system are nearly identical. The goals of sentencing in the federal civilian system include just punishment (retribution), general and specific deterrence, incapacitation, and (albeit it to a lesser degree than in the past) rehabilitation.[47] The military justice system recognizes these four sentencing goals plus "preservation of good order and discipline."[48] Despite this basic similarity between the two systems in terms of their overall objectives,[49]

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[43] R.C.M. 1001(c)(3)-(d).

[44] R.C.M. 1001(c)(2).

[45] R.C.M. 1001(g).

[46] *See* FED. R. CRIM. P. 31-32.

[47] 18 U.S.C. § 3553(a)(2); *see also* ABA CRIMINAL JUSTICE STANDARDS: SENTENCING 18-2.1 [hereinafter ABA STANDARDS].

[48] BENCHBOOK, *supra* note 38, at 2-5-21; *see also* United States v. Barrow, 26 C.M.R. 123 (C.M.A. 1958) ("In civilian courts, a judge is primarily concerned with the protection of society, the discipline of the wrongdoer, the reformation and rehabilitation potential of the defendant, and the deterrent effect on others who are apt to offend against society. Those are all essential matters to be considered by a convening authority but, in addition, he must consider the accused's value to the service if he is retained and the impact on discipline if he permits an incorrigible to remain in close association with other members of the armed services.").

[49] Although both systems continue to embrace all four of sentencing goals (plus good order and discipline in the military), the goal of rehabilitation was de-emphasized, though not rejected, by the Sentencing Reform Act of 1984. The Act retained rehabilitation as a sentencing purpose, but reduced its importance by barring sentencing courts from seeking to achieve that purpose through the sanction of imprisonment. *Compare* In re Sealed Case, 573 F.3d 844, 850-51 (D.C. Cir. 2009) (discussing the decreased significance of rehabilitation as a sentencing goal in the federal system) *with* 10 U.S.C. § 951(b) (directing the Secretary concerned to "provide for the education, training, rehabilitation, and welfare of offenders confined in a military correctional facility of his department; and [to] provide for the organization and equipping of offenders selected for training with a view to their honorable restoration to duty or possible reenlistment."). As rehabilitation fell somewhat out of favor in the federal system in the 1970's and 80's, deterrence and incapacitation gained favor as alternative sentencing theories, including within the military. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822-23 (1974); *see also* United States v. Lewis, 2 M.J. 834, 839 (A.C.M.R. 1976) (Costello, J., concurring) ("Deterrence theory has a place in military sentencing procedures today, just as it does in civilian practice. That place is both proper and necessary; proper because it does not offend against the maxim that a sentence ought to fit the individual

military sentencing procedures and rules for sentence determination differ from those applicable in federal district court. This difference may be attributed to the lack of jury participation in sentencing in the federal civilian system in all non-capital cases.[50] (In capital cases, absent an agreement by the parties to sentencing by the trial judge, the jury determines aggravating and mitigating factors and makes a sentencing recommendation to the trial judge.[51])

Before the Sentencing Reform Act of 1984, federal judges exercised virtually unfettered sentencing discretion, similar to the discretion exercised by both military judges and members in current military practice. As in the military system, the only limitations on federal judges' sentencing discretion were statutory maximum sentences.[52] Judges were free to sentence based on the sentencing goals (retribution, deterrence, incapacitation, rehabilitation) and sentencing objectives (uniformity, proportionality, individualization) of their choosing.[53] This discretionary system was criticized for resulting in unwarranted sentencing disparity.[54] Federal judges operating within this discretionary system were well-trained concerning the general theories of sentencing, the rules of evidence, data

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criminal and necessary because the notion of deterrence is fundamental to our basic concepts of the criminal justice system in the United States.").

[50] *See* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 139 (June 2014) ("In the federal criminal justice system and 44 states, judges, not juries, impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases.").

[51] 18 U.S.C. §§ 3593-94.

[52] *Compare* 10 U.S.C. § 856 (UCMJ art. 56) *with* Williams v. New York, 337 U.S. 241 (1949); *see* LAFAVE ET AL., *supra* note 28, at §§ 26.1(a) and 26.3(a)-(b).

[53] *See* Immel, *supra* note 36, at 181 ("Sentencing goals should not be confused with sentencing objectives. Sentencing goals relate to why an individual is punished. Sentencing objectives relate to the goals of the sentencing system in meting out that punishment. . . . The military pursues its sentencing goals using sentencing discretion and individual sentencing. The federal system pursues [nearly identical] goals through the U.S. Sentencing Commission and the use of sentencing guidelines.").

[54] *See* ADVISORY COMMISSION REPORT, *supra* note 30, at 5 ("[C]ivilian judges demonstrate that disparities are inevitable when judges or juries sentence in a system that gives the sentencing authority a wide range of choices."); ABA STANDARDS, *supra* note 47 18-2.6, Commentary ("Systems of 'indeterminate' sentencing, which invest sentencing judges and parole boards with broad discretion in making sentencing decisions, have resulted in unwarranted disparity in individual sentences and have contributed to decades of unplanned change in overall patterns of sentencing."); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1688-89 (1992) ("In a system without acknowledged starting points, measuring rods, stated reasons, or principled review, unwarranted (or at least unexplained) disparity and disproportionality seemed to flourish. Some observers placed the blame for disparity on judges. Others faulted the system: it lacked up-front standards for selecting sentences and had no appellate review to provide principles and precedents. At least one critic found judges rudderless and the system lawless."); *see generally* Stith, Kate and Koh, Steve Y., "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines" (1993), *Faculty Scholarship Series*, Paper 1273.

concerning which sentences are commonly imposed for certain crimes, and other information relevant to determining appropriate sentences in individual cases.[55]

With the enactment of the Sentencing Reform Act of 1984 and the implementation of Sentencing Guidelines three years later,[56] the wide discretion exercised by federal judges during sentencing became more constrained, as their sentence determinations were tethered to statutory sentencing factors, sentencing ranges, and clearly defined sentencing goals.[57] The purpose of this shift toward less discretion was to:

> [P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and [to] reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . . .[58]

Today, the sentencing ranges established by the federal sentencing guidelines are just one of eight factors the judge is required to consider at sentencing, but they are not mandatory and do not bind the judge in his sentencing determination, and federal sentencing under discretionary guidelines is less uniform than under mandatory guidelines. The other factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the general goals of sentencing; (3) the kinds of sentence available; (4) the sentences and sentencing ranges established by the Sentencing Guidelines; (5) any policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.[59] In contrast, the military justice system does not currently have statutory

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[55] *See* ADVISORY COMMISSION REPORT, *supra* note 30, at 28 (Minority Report in Favor of Proposed Change to Judge-Alone Sentencing); ABA STANDARDS, *supra* note 47, at 18-2.6, Commentary ("By institutional training, judges have long experience in rendering particularized outcomes within a legal framework, and their decisions are uniquely public and subject to appellate review.").

[56] 28 U.S.C. §§ 991-998; *see* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (2013), *available at* http://www.ussc.gov/guidelines-manual/2013-ussc-guidelines-manual.

[57] *See* 18 U.S.C. § 3553(a) (Factors to be Considered in Imposing a Sentence).

[58] 28 U.S.C. § 991(b)(1)(B)-(C). *See generally* Stith and Koh, *supra* note 54. In the years leading up to the passage of the Sentencing Reform Act, there was public debate about the goals of criminal sentencing and the need for clear, statutory guidance. *See, e.g.*, *Rational Sentencing*, N.Y. TIMES, May 29, 1976, at A22 (editorial) ("Any new sentencing program which does not address itself to [the purposes of sentencing] . . . is apt ultimately to lapse into confusion born of the absence of an intellectual core."); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 424 (1993) ("Determining which disparities are unwarranted necessarily requires some standard of 'unwarrantedness' *other than disparity itself*.").

[59] 18 U.S.C. § 3553(a).

sentencing factors, and R.C.M. 1002 provides little guidance regarding determining an appropriate sentence.

A second area of difference between military sentencing practice and federal civilian sentencing practice concerns the sentencing proceeding itself. In the federal civilian system, the merits and sentencing phases of the trial are bifurcated. Following a guilty verdict, probation officers conduct a presentence investigation and prepare an extensive presentence report to inform the discretion of the sentencing judge.[60] The sentencing proceeding takes place no sooner than 35 days following the issuance of the pre-sentencing report to the defendant.[61] In addition, in the federal civilian system, the rules of evidence are not applied during sentencing, and judges exercise wide discretion in the sources and types of evidence they may use to adjudge an appropriate sentence.[62]

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[60] FED. R. CRIM. P. 32(c)-(d). The presentence report evolved from a document historically prepared only as a precondition to probation into mandatory requirement, seen as a basis for informed sentencing and appropriate individualization of sentences. ABA STANDARDS, *supra* note 47, at 18-5.2, Commentary.

[61] FED. R. CRIM. P. 32(e)(2). The presentence report contains a wide variety of information about the offense and the offender relevant to the sentencing factors listed in 18 U.S.C. § 3553, including: identification of applicable sentencing guidelines and policy statements; calculation of the defendant's offense level, criminal history category, and the sentencing range available; identification of factors relevant to the sentences range or departures therefrom; the defendant's history and characteristics, including prior criminal record, financial condition, and unique behavioral circumstances; information concerning the financial, social, psychological, and medical impact on any victim; a description of any non-prison programs or resources available; information on restitution and forfeiture; and any specific information that the court requests. The probation officer tasked with producing the presentence report is given wide investigative authority, including the authority to interview the defendant and incorporate any findings into the report. These presentence reports contribute to the federal sentencing goals by giving the sentencing judge a more thorough basis of information upon which to base his determinations, and by ensuring that the information before the court is reliable, material, and relevant to the sentencing factors listed in 18 U.S.C. § 3553(a). *See* Williams v. New York, 337 U.S. 241, 249 (1949) ("[A] strong motivating force for the changes [in sentencing philosophy and treatment of offenders] has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified."); *accord* United States v. Loving, 68 M.J. 1 (C.A.A.F. 2009) (discussing the Supreme Court's recognition that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.") (quoting Boyde v. California, 494 U.S. 370, 382 (1990)). *But see* ABA STANDARDS, *supra* note 47, at 18-532, Commentary (addressing two "troublesome" aspects of presentence reports: inclusion of too much material, and inclusion of material of dubious accuracy.).

[62] 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *see Williams*, 337 U.S. at 246-47 (1949) ("A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."); United States v. Pratt, 553 F.3d 1165, 1170 (8th Cir. 2009) (sentencing judges have "wide discretion at sentencing as to the kind of information considered or its

Federal courts have held that consideration of certain factors is never permissible, including the race or gender of the defendant or the victim, the defendant's exercise of fundamental rights, or the defendant's exercise of certain procedural rights.[63] Second, the courts have fashioned a due process test for determining the admissibility of sentencing evidence objected to by either party:

> In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, *provided that the information has sufficient indicia of reliability to support its probable accuracy.*[64]

Under federal law, the court's determination of whether "sufficient indicia of reliability" exist in a given instance is a factual determination within the discretion of the sentencing judge—although there is some variance among the Circuits on the amount or quality of corroborating information needed to establish "sufficient indicia of reliability,"[65] and on the standard of review applicable when reviewing a sentencing judge's findings in this area.[66]

Military sentencing procedures vary from these aspects of federal civilian practice. First, there currently are no probation officers or presentence reports in military practice.[67] The Analysis to R.C.M. 1001(b) notes that the intent of the rule is to "allow the presentation of

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source."); *see also* LAFAVE ET AL., *supra* note 28, at § 26.4(a) ("*Williams* is considered the leading ruling on at least three basic elements of due process in sentencing procedure: (i) the range of the factors that a judge may consider in imposing a sentence; (ii) the right of the defendant to be informed of the factors being considered by the judge and of the evidence being advanced in support of those factors; and (iii) the opportunity given to the defendant to challenge the existence and relevancy of those factors.").

[63] *See* LAFAVE ET AL., *supra* note 28, at §§ 26.4(b)-(c).

[64] *Pratt*, 553 F.3d at 1170 (emphasis added); *see id.* (officer's testimony about pending drug investigations was based on hearsay but still sufficiently reliable for sentencing purposes) (citing GUIDELINES § 6A1.3(a)); United States v. Rodriguez-Ramos, 663 F.3d 356, 364 (8th Cir. 2011) (double hearsay evidence concerning accused's outstanding warrants in Mexico sufficiently reliable for sentencing purposes); United States v. Galvan 949 F.2d 777, 784 (5th Cir. 1991) ("the court is not bound by the rules of evidence and may consider any relevant information without regard to its admissibility provided the information considered has sufficient indicia of reliability."); United States v. Silverman, 976 F.2d 1502, 1512 (6th Cir. 1992) (en banc) (a "district court may consider hearsay evidence in determining an appropriate sentence, but the accused must be given an opportunity to refute it, and the evidence must bear some minimal indicia of reliability in respect of defendant's right to due process.").

[65] *Compare* United States v. Petty, 982 F.2d 1365, 1367 (9th Cir. 1993) (hearsay statements may be sufficiently reliable if corroborated by physical evidence or the testimony of other witnesses) *with* United States v. Rogers, 1 F.3d 341, 344 (5th Cir. 1993) (finding sufficient indicia of reliability in a confidential informant's reports regarding the quantity of accused's drugs even without independent corroboration of the specific amounts alleged).

[66] *Compare* United States v. Sprauer, 358 Fed.Appx. 871, 872 (9th Cir. 2009) (district court's finding that a letter from the Department of Corrections had "sufficient indicia of reliability" reviewed for abuse of discretion) *with* United States v. Manis, 344 Fed.Appx. 160, 164 (6th Cir. 2009) (district court's admission of hearsay statements at sentencing reviewed for clear error).

[67] United States v. Hill, 4 M.J. 33, 37 n.18 (C.M.A. 1977).

much of the same information to the court-martial as would be contained in a [federal] presentence report, but . . . within the protections of an adversarial proceeding, to which rules of evidence apply."[68] However, the only mandatory information that the Rule requires to be introduced in sentencing is the accused's service data from the charge sheet.[69] Also, in military practice, the sentencing proceeding itself generally is held immediately after the announcement of findings, which promotes efficiency and finality. Finally, despite *Williams*, military practice applies the rules of evidence at the sentencing hearing (subject to the military judge's ability to relax the rules for the defense). Whether or not required due to members sentencing, the application of the full rules of evidence to the sentencing proceeding has been cited as both unnecessary and contrary to the ultimate ends of military justice.[70]

6. Recommendation and Justification

Recommendation 53.1: Amend Article 53 to require sentencing by a military judge in all non-capital general and special courts-martial.

This proposal would present an opportunity for military judges to fashion appropriate sentences based on all relevant information available about the accused and the circumstances surrounding the offenses of which he is convicted, which would align military practice more closely to federal civilian practice.

In addition, the proposed changes would conform military sentencing standards to the practice in the vast majority of state courts, as reflected in the ABA Standards for Criminal Justice in Sentencing, which state: "Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence."[71]

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[68] 2012 MCM, app. 21, p. 72 (Analysis of RCM 1001(b)).

[69] *Id.*, R.C.M. 1001(b)(1).

[70] *See, e.g.*, Vowell, *supra* note 1, at 89 ("The current rules for admissibility of evidence at the sentencing phase of a court-martial are an attempt to engraft the full measure of constitutional due process and confrontation protections from the findings phase without ever determining if such protections are either essential to our system of justice or constitutionally required."); Lovejoy, *supra* note 1, at 35-36 ("[T]he Military Rules of Evidence severely limit the evidence members may be exposed to. Consequently, the government's ability to offer substantial evidence about the accused or the offense often is frustrated and the resultant sentence is based on little or no information about the accused or the offense. Moreover, it is the accused and not the government who controls the amount and type of evidence that the government may introduce regarding the accused's background and character. If the accused has a bad record, he or she can keep this from the members by not 'opening the door' for the government by introducing any good character evidence. Conversely, if he or she has a good background, the defense can present a great variety of evidence in extenuation and mitigation.").

[71] ABA STANDARDS, *supra* note 47, at 18-1.4.

This proposal would allow reforms in the sentencing process in general and special courts-martial that are impractical absent judge-alone sentencing. Specifically:

Judge-alone sentencing would allow for changes in the rules and procedures pertaining to sentencing that would expand the range of evidence and information provided to the sentencing authority to adjudge an appropriate sentence and increase the transparency of the sentencing process.

Judge-alone sentencing would allow for victim-impact statements to be introduced and used in the sentencing proceeding in the same manner as in civilian courts, and would allow for incorporation of victim impact statement procedures directly into R.C.M. 1001, the rule governing sentencing proceedings.

Judge-alone sentencing would allow for expansion of R.C.M. 1002 and the implementation of sentencing guidance similar to the "sentencing factors" used to guide the sentencing discretion of federal judges under 18 U.S.C. § 3553(a). Such a rule would promote greater consistency and uniformity among sentencing authorities with respect to the goals of military sentencing and the factors that must be considered and balanced in each individual case.

Judge-alone sentencing would eliminate the need for member instructions before sentencing. These instructions, which are imperative in a members sentencing system, often give rise to objections and can sometimes result in sentences being vacated on appeal.

Judge-alone sentencing would allow for a shift to segmented sentencing, where the military judge would consider an appropriate sentence for each offense rather than an overall sentence based on the combined offenses. (This proposal is discussed in detail in the section of this Report concerning Article 56.) In a members' sentencing system, panel voting requirements and the need to determine whether periods of confinement run consecutively or concurrently make segmented sentencing impractical.

Judge-alone sentencing would enhance review of sentence determinations by appellate courts. In a members sentencing system, appellate review of such determinations is not possible, as a panel cannot be called upon to explain how it arrived at a particular sentence. This would intrude upon the members' sentencing deliberations, and potentially subject the members to allegations of improper influence. More problematically, each member of a panel may vote for a particular sentence for different reasons.

Recommendation 53.2: Amend Article 53 to provide that, in cases where the accused may be sentenced to death, the members shall participate in the sentence determination consistent with federal civilian practice.

This proposal would better align military sentencing practice in capital cases with the practice in federal district courts under 18 U.S.C. §§ 3593-94. Under the proposal, a panel would determine whether the accused should be sentenced to death, to life without eligibility for parole, or to some lesser sentence for capital offenses. The panel's sentence determination with respect to death or life without eligibility of parole would be binding on

the military judge. The military judge would determine all other punishments (e.g. reduction, forfeitures, discharge), and in cases where the panel voted for a sentence less than life without parole, the judge would determine the entire sentence.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating sentencing practices used in U.S. district courts, and almost all state jurisdictions. The proposal draws upon the experience of members and considers a broad range of information to arrive at its final recommendation. This proposal also considers the recommendations of the Response Systems Panel to Adult Sexual Assault Crimes Panel.

This proposal supports MJRG Operational Guidance by employing the standards and procedures of the civilian sector insofar as practicable, by promoting justice and enhanced efficiency during the sentencing phase of the court-martial. With respect to sentencing in capital cases, this proposal relates to other proposals in this Report that also address capital cases, including the proposals relating to Article 52 (requiring a unanimous finding of guilt); Article 56 (exempting capital cases from sentencing parameters and criteria), and Article 27 (requiring learned counsel, to the greatest extent practicable, for death penalty cases, including during the sentencing phase).

8. Legislative Proposal

SEC. 716. FINDINGS AND SENTENCING.

Section 853 of title 10, United States Code (article 53 of the Uniform Code of Military Justice), is amended to read as follows:

"§853. Art. 53. Findings and sentencing

"(a) ANNOUNCEMENT.—A court-martial shall announce its findings and sentence to the parties as soon as determined.

"(b) SENTENCING GENERALLY.—(1) Except as provided in subsection (c) for capital offenses, if the accused is convicted of an offense in a trial by general or special court-martial, the military judge shall sentence the accused. The sentence determined by the military judge constitutes the sentence of the court-martial.

"(2) If the accused is convicted of an offense in a trial by summary court-martial, the court-martial shall sentence the accused.

"(c) SENTENCING FOR CAPITAL OFFENSES.—(1) In a capital case, if the accused is convicted of an offense for which the court-martial may sentence the accused to death—

"(A) the members shall determine whether the sentence for that offense shall be death, life in prison without eligibility for parole, or a lesser punishment determined by the military judge; and

"(B) the military judge shall sentence the accused for that offense in accordance with the determination of the members under subparagraph (A).

"(2) In accordance with regulations prescribed by the President, the military judge may include in any sentence to death or life in prison without eligibility for parole other lesser punishments authorized under this chapter.".

9. Sectional Analysis

Section 716 would amend Article 53 to provide for judicial sentencing in all general and special courts-martial. This change would better align military sentencing practice with federal civilian sentencing practice, as well as the practice in the majority of state jurisdictions. Judicial sentencing would create the opportunity for greater uniformity and consistency in court-martial sentences, enhanced efficiency and cost-savings, and would facilitate further reforms in military sentencing practices and procedures.

Article 53(c), as amended, would provide that, for capital offenses, members will determine whether the sentence shall include death, life without eligibility for parole, or such other lesser punishments as may be determined by the military judge. The military judge would sentence the accused in accordance with the determination of the members, including to other lesser punishments in accordance with regulations prescribed by the President.

Implementing rules would address procedures for sentencing proceedings and sentence determination in the context of judge-alone sentencing, including with respect to: releasing the members, subject to recall, after the findings are announced in a non-capital case; the admissibility of sentencing information offered by the parties and the grounds for objection to such information; the rights of victims to participate in sentencing proceedings; the use of victim impact statements during sentencing; the duties of trial and defense counsel before and during the proceeding; the rules and factors to guide military judges in their sentence determinations (similar to 18 U.S.C. § 3553(a)); and rules pertaining to appellate review of military judge sentence determinations and findings.

Article 53a (New Provision) – Plea Agreements
10 U.S.C. § 853a

1. Summary of Proposal

This proposal would create a new statute, transferring the authority for plea agreements—currently referred to as "pretrial agreements"—from Article 60 (Action of Convening Authority) to a new Article 53a (Plea Agreements). The proposed statute would provide basic rules concerning: (1) the construction and negotiation of plea agreements concerning the charges, the sentence, or both; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of plea agreements containing sentence limitations with respect to the military judge's sentencing authority. This proposal is related to the proposals in this Report to amend Articles 16, 53, 56, and 60 to allow for judge-alone sentencing in all non-capital cases, to establish sentencing parameters and criteria, and to move to an "entry of judgment" post-trial procedure model. Part II of the Report will provide more detailed implementing rules and procedures for the new statute.

2. Summary of the Current Statute

Currently, three articles in the UCMJ provide statutory authority for the government to negotiate binding agreements with a military accused concerning the charges to be referred to court-martial, the level of court-martial or other disciplinary proceeding to be convened, and the sentence that may be approved on the charges. Article 60 provides convening authorities with "the authority to approve, disapprove, commute, or suspend the sentence adjudged by the court-martial in whole or in part pursuant to the terms of [a] pre-trial agreement." Because courts-martial are transitory in nature, all plea agreements that contain binding sentence limitations derive their authority from this statute. In addition, Articles 30 and 34 vest discretion in convening authorities to dispose of charges and specifications against an accused "in the interest of justice and discipline," including by referring (or not referring) the charges to court-martial for trial. These articles are the basis of all agreements concerning disposition of the charges and specifications in a particular manner or to a particular forum in exchange for the accused's plea and other concessions.

3. Historical Background

Although there were no specific statutory or regulatory provisions governing the use of plea agreements in courts-martial until 1984, these agreements have been a part of military practice at least as far back as 1953. At that time, the Assistant Judge Advocate General of the Army, Major General Franklin P. Shaw, successfully proposed the use of plea agreements to help relieve a military justice system that was over-worked and over-

clogged as the result of two major wars.[1] That year, the Court of Military Appeals gave an initial non-committal acknowledgement of the use of plea agreements,[2] and it began to issue decisions that shaped plea-bargaining practice shortly thereafter.[3] By the end of the decade, a reference to plea-bargaining had been inserted into the MCM,[4] and the practice of using plea agreements to secure convictions—the "adoption of [which] was not an altruistic act, but a pragmatic decision to avoid drowning in a sea of litigation"[5]—had achieved widespread acceptance within the Army, Navy, and Coast Guard. The Air Force, however, continued to prohibit their use until 1975.[6]

In the absence of statutory and regulatory guidance on plea agreements during most of the formative years under the UCMJ, the rules for their use in courts-martial developed primarily through case law. In the mid-1950s, and from the late 1960s through the 1970s, plea agreements were looked upon with substantial skepticism, and terms that are now commonplace were subjected to severe appellate scrutiny.[7] Even terms that were found permissible were accepted with some degree of derision. For example, an agreement calling for trial by military judge alone was allowed but had "the appearance of evil,"[8] and a term prohibiting the accused from engaging in future misconduct was allowable but not "proper."[9] When the Rules for Courts-Martial were adopted in 1984, the rules concerning

[1] Col. Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 4 (2004).

[2] United States v. Gordon, 10 C.M.R. 130, 132 (C.M.A. 1953) ("While we express no view relative to the desirability or feasibility of such a practice before courts-martial, we observe that it has the sanction of long usage before the criminal courts of the Federal and state jurisdictions.").

[3] *See, e.g.*, United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957) ("If [an accused] enters into a pretrial agreement in regard to his plea with the [convening authority], the agreement cannot transform the trial into an empty ritual.").

[4] *See* MCM 1951, Part. XII, ¶70b, (1951) [hereinafter 1951 MCM], *as amended in* Manual for Courts-Martial, United States 1959, Pocket Part, at 39-40 (1960).

[5] Jackson, *supra* note 1, at 4. "Between 1952 and 1956, the guilty plea rate in Army general courts-martial rose from less than one percent to sixty percent. This allowed staff judge advocates to substantially reduce general courts-martial processing times, enabling them to process 11,168 general courts-martial in FY 1953, and then catch their breath as the number of such trials dropped to 7,750 in 1956. By 1958, this combination of increased guilty pleas and decreased general courts-martial reduced the workload of the Army Board of Military Review enough to eliminate three of its seven panels of appellate judges." *Id.* at 4-5.

[6] *Id.* at 4.

[7] *Compare* United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968) (holding that waiver of speedy trial "has no place in any pretrial agreement" and that pretrial agreements should "concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions . . .") *with* United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997) (enforcing any agreement not prohibited by the rules); *see* Jackson, *supra* note 1, at 35-39; *see also* Maj Stefan Wolfe, *Pretrial Agreements: Going Beyond the Guilty Plea*, 2010 ARMY LAW. 27, 29 (Oct. 2010) ("In the initial years of the UCMJ, courts were extraordinarily paternalistic in reviewing pretrial agreements.").

[8] United States v. Schmeltz, 1 M.J. 8, 11 (C.M.A. 1975).

[9] United States v. Dawson, 10 M.J. 142, 148-49 (C.M.A. 1981).

permissible and prohibited pretrial agreement terms and conditions reflected the prevailing case law at the time.[10]

Because of the unique role of the convening authority in military justice practice, the rules and procedures applicable to plea agreements concerning the sentence to be adjudged and approved developed much differently than in the federal civilian system. Under applicable case law and rules, the military judge's determination of an appropriate sentence must be independent, without prior reference to any sentence agreement between the convening authority and the accused.[11] To accommodate this, plea agreements are divided into two parts: the first part of the agreement contains the agreement's terms and conditions; the second part contains the sentence limitations (the "cap" or "quantum"). The military judge is prohibited from examining Part 2 of the agreement until after announcing the adjudged sentence.[12]

This practice results from a confluence of two UCMJ Articles. First, Article 60 gives convening authorities discretion to decrease adjudged sentences, but it prohibits them from increasing sentences. Thus, even if the parties were to agree in advance to a specific sentence or sentence range, the convening authority would be powerless to increase any adjudged sentence to conform to the agreement. Second, under a practice that was developed before the establishment of military judges in 1968, the sentencing authority cannot be informed in advance of a sentence limitation because that would be tantamount to allowing the court to be influenced by the convening authority's view on an appropriate sentence, in violation of Article 37's prohibition on unlawful command influence.

In short, in military plea-bargaining practice, if the sentence adjudged at trial is below the sentence "cap" agreed to by the parties—a cap that is not disclosed to the sentencing authority at trial—the accused receives the lower sentence, the sentence adjudged at trial.

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[10] R.C.M. 705(c) (1984). *See* United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) (finding term in pretrial agreement requiring the accused to enter into a stipulation of fact was not an illegal collateral condition); United States v. Reynolds, 2 M.J. 887, 888 (A.C.M.R. 1976) (finding a provision requiring the accused to testify truthfully in other proceedings to be permissible); United States v. Callahan, 8 M.J. 804, 806 (N.M.C.M.R. 1980) (allowing a term requiring that the accused pay cash restitution to victims acceptable and cautioning against restitution "in-kind," such as labor); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1982) (approving 'no misconduct' provision in plea deal, but holding that the CA must give accused due process before setting aside sentence limitation); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (finding that it is permissible to waive the Article 32 Investigation as part of a pretrial agreement); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (approving a plea deal in which the accused was required to request trial by judge alone); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (allowing the accused to waive Government production of sentencing witnesses as part of pretrial agreement).

[11] United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) ("Inquiry into the actual sentence limitations specified in the plea bargain should be delayed until after announcing sentence where the accused elects to be sentenced by the military judge rather than a court with members"); *see* R.C.M. 910(f)(3) ("If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge-alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.").

[12] *See* R.C.M. 910(f)(3).

But if the sentence adjudged at trial is above the sentence cap agreed to by the parties, the accused gets the benefit of the sentence cap, because the convening authority is prohibited from approving any sentence above the agreed upon cap. This system—which was not planned by the drafters of the UCMJ, but which rather evolved from a confluence of statutory structure, case law, and procedural rules over the course of several decades—has come to be known, and criticized, as "beat the deal" plea-bargaining.[13]

4. Contemporary Practice

Today, the use of plea agreements to secure convictions in exchange for sentence caps and other concessions is standard practice throughout the services—though service practices with respect to standard terms, conditions, and restrictions in agreements vary.[14] In addition to the statutory provisions concerning plea agreements in Article 60, the President has prescribed two rules controlling their use, acceptance, and effect in court-martial cases. R.C.M. 705 (Pretrial agreements) provides specific guidance on the use, structure, and effect of pretrial agreements, including permissible and prohibited terms and conditions and the prohibition on disclosing the existence of a pretrial agreement to the panel.[15] Under the rule, "The decision whether to accept or reject an offer [of the accused to enter into a pretrial agreement] is within the sole discretion of the convening authority."[16] R.C.M. 910 (Pleas) implements Article 45, and governs the plea process itself, including the duties of the military judge to advise the accused properly, to ensure the plea is voluntary and accurate, to ensure the accused understands the terms and effect of any pretrial agreement, and to issue findings appropriately upon acceptance of the plea.[17] Under the rule, the military judge may strike any provisions in a pretrial agreement that are prohibited by R.C.M. 705(c)(1) or that "violate appellate case law, public policy, or notions of fundamental fairness."[18]

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[13] *See, e.g.*, Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 46 (2009) (criticizing "beat the deal" plea-bargaining as inherently slanted in favor of the convicted servicemember).

[14] *See, e.g.*, AIR FORCE INSTR. 51-201, Administration of Military Justice (6 June 2013) [hereinafter AFI 51-201], at 8.4.1–8.4.3 (setting forth restrictions on the use of pretrial agreements that differ from the practice in the other services).

[15] R.C.M. 705(b)-(e).

[16] R.C.M. 705(d)(3) (emphasis added); *see also* United States v. Callahan, No. 200100696, 2003 CCA LEXIS 165, at n.3 (N-M Ct. Crim. App. July 30, 2003) ("this Court gives deference to a CA's decision on the appropriate disposition of charges or a decision regarding the appropriate limitations of punishment agreed to in a pretrial agreement as these decisions are also exercises of *prosecutorial* discretion."). *Cf.* FED. R. CRIM. P. 11(c)(3)(A) (". . . the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.").

[17] R.C.M. 910(a)-(j).

[18] United States v. Thomas, 60 M.J. 521, 528 (N-M Ct. Crim. App. 2004). In some cases, military courts have held that the presence of an impermissible term requires nullification of the entire pretrial agreement and the authorization of a rehearing. *See, e.g.*, United States v. Holland, 1 M.J. 58, 60 (C.M.A. 1975). In most cases,

5. Relationship to Federal Civilian Practice

In both military practice and federal civilian practice, the parties are allowed to plea-bargain on the charges, the sentence, or both. Both systems rely on plea-bargaining to efficiently administer justice, and both systems provide safeguards to ensure the accused is not coerced by the government into signing a plea agreement that does not represent the accused's actual guilt, or that exaggerates his or her wrongdoing. The Supreme Court recognizes the federal plea-bargaining process provides systemic benefits, including facilitating pleas and speeding the process of rehabilitation; increasing the certainty of both parties in the results; protecting society from individuals who otherwise might be out on bail pending completion of their trials; and helping to conserve limited judicial and prosecutorial resources.[19] These benefits are applicable to plea-bargaining in the military justice system, as well. The two systems differ in the area of sentence agreements.

In federal civilian practice, the parties can bargain on sentence by agreeing that a specific sentence or sentencing range is appropriate for the offense, which may or may not be binding on the judge's sentencing discretion.[20] If the agreement is one that binds the sentencing discretion of the sentencing judge, after reviewing the agreement, the judge has three options: (1) accept the agreement and adjudge the sentence (or within the limits of the sentence range) agreed to by the parties; (2) reject the agreement entirely; or (3) defer the decision until after review of the presentence report.[21] Because the sentence agreement is binding, the parties—and any victim of the offense—are able to know in advance the upper and lower bounds of the sentence that is likely to be adjudged. If the judge rejects an agreement, that rejection is reviewable (at the request of the defendant) for abuse of discretion.[22] The federal rule states that "[t]he court must not participate in these [plea agreement] discussions."[23]

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however, an impermissible term may be stricken without impairing the remainder of the agreement. *See, e.g.*, United States v. McLaughlin, 50 M.J. 217, 218-19 (C.A.A.F. 1999).

[19] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[20] *See* FED. R. CRIM. P. 11(c)(1)(C). The Rule 11(c)(1)(C) agreement is one of two types of sentence agreements in federal practice. Under Rule 11(c)(1)(B), the prosecutor makes a recommendation to the judge that a particular sentence or sentencing range is appropriate. The recommendation is not binding on the judge's sentencing discretion. Whether prosecutors use the recommendation-type sentence agreement under Rule 11(c)(1)(B) or the binding "C" sentence agreement is largely a function of local practice, as usage varies by district. In recent years, type "C" agreements have become more favored. *See generally* Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post*-Booker, 37 WM. MITCHELL L. REV. 469 (2011); *see also* Barry Boss and Nicole L. Angarella, *Negotiating Federal Plea Agreements Post*-Booker*: Same As It Ever Was?*, 2 CRIM. J. 22 (2006).

[21] FED. R. CRIM. P. 11(c)(3)(A).

[22] *See, e.g.*, In re Morgan, 506 F.3d 705, 710-711 (9th Cir. 2007). Federal judges exercise wide discretion with respect to accepting or rejecting binding sentence agreements. *See, e.g.*, Ellis v. United States District Court, 356 F.3d 1198, 1209 (9th Cir. 2004) (upholding a district court's rejection of a sentence agreement where the court "viewed the sentence resulting from the plea bargain as not in the best interest of society, given [the accused's] criminal history and the circumstances of the offense charged."); State v. Conger, 325 Wis.2d 664, 797 N.W.2d 341 (2010) ("[A] circuit court must review a plea agreement independently and may, if it

In the federal system, use of "specific sentence/sentencing range" plea agreements predates the adoption of the Federal Sentencing Guidelines in 1984. Since their adoption, the Guidelines have provided a framework—in addition to the other sentencing factors under 18 U.S.C. § 3553(a)—for analyzing the discretionary acceptance/rejection of sentence agreements by trial judges.[24] Under the Guidelines, a court may impose the agreed-upon sentence only if it is satisfied that the sentence is either "within the applicable guideline range" or "departs from the applicable guidelines range for justifiable reasons."[25]

6. Recommendation and Justification

Recommendation 53a.1: Enact a new Article 53a to provide statutory authority and basic rules for: (1) the construction and negotiation of charge and sentence agreements; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of sentence agreements with respect to the military judge's sentencing authority.

Under this Report's proposal to amend Article 60 to establish an "entry of judgment" model for the military judge's sentence determinations, a new statutory authority for the convening authority's ability to enter into binding plea agreements with the accused will be necessary. This proposal would create a new statute to transfer the authority currently in Article 60 into a new article, while providing more robust statutory rules concerning the construction and operation of plea agreements in the adjudication process.

Part II of the Report will provide implementing rules for this proposed statute, with particular emphasis on the opportunity for negotiated sentencing ranges. Under this proposal, if the agreement contained a negotiated sentencing range or sentence limitation, the military judge would enter a sentence in accordance with the agreement unless the judge determined the negotiated sentencing range or sentence limination to be plainly unreasonable or otherwise unlawful.

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appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest"). However, the discretion of district judges to reject sentence agreements "is not unbounded," and courts abuse their discretion when they fail to "consider individually every sentence bargain presented to them and . . . set forth, on the record, [their] reasons in light of the specific circumstances of the case for rejecting the bargain." *In re Morgan*, 506 F.3d at 712; *accord* United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995) (noting that the requirement for judges to set forth the reasons for their rejection of a plea agreement "helps insure the court is aware of and gives adequate deference to prosecutorial discretion" and "is the surest, indeed the only way to facilitate appellate review of rejected plea bargains.").

[23] FED. R. CRIM. P. 11(c)(1). *See* United States v. Baker, 489 F.3d 366 (D.C. Cir. 2007) (district court violated rule when it impermissibly engaged in lengthy plea discussion with defendant concerning sentence length).

[24] *See* United States v. Wright, 291 F.R.D. 85, 88 (E.D. Penn. 2013) ("In considering . . . plea agreements, courts follow the framework provided by the United States Sentencing Guidelines, which are now advisory. An agreement should be accepted 'only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons.'") (citing U.S. Sentencing Guidelines Manual § 6B1.2 cmt. (2012)). *See generally* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, & ORIN KERR, CRIMINAL PROCEDURE § 21.1(h) (3d ed. 2013).

[25] U.S.S.G. § 6B1.2(b)-(c).

Part II of the Report will also address procedures to allow the victim to be heard by the convening authority before a decision on a plea agreement. Plea agreements are one of the primary tools convening authorities utilize to dispose of charges against an accused; however, currently, R.C.M. 705 does not address the role of the victim in this decision. The implementing rules that will be proposed in Part II of the Report will address this gap in the current rules.

Recommendation 53a.2: In the new Article 53a, provide that the military judge shall accept any lawful sentence agreement submitted by the parties, except that: (1) in the case of an offense with a sentencing parameter under Article 56, the military judge may reject the agreement only if it proposes a sentence that is both outside the sentencing parameter and plainly unreasonable; and (2) in the case of an offense without a sentencing parameter, the military judge may reject the agreement only if it proposes a sentence that is plainly unreasonable.

This proposal would better align military plea-bargaining practice with federal civilian plea-bargaining practice, and would result in increased efficiencies and greater bargaining power for both parties.

The proposed "plainly unreasonable" standard would ensure that military judges are appropriately constrained in their ability to reject sentence agreements entered into by the parties, while at the same time providing military judges the authority to reject agreements they determine are unacceptable, consistent with federal civilian practice. The decision of a military judge to reject an agreement would be reviewable for an abuse of discretion.

This proposal takes into account the Response Systems to Adult Sexual Assault Crimes Panel's recommendation to "study whether the military plea bargaining process should be modified."[26]

Part II of the Report will address the rules implementing Article 53a, including a requirement that if the military judge holds that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination.

7. Relationship to Objectives and Related Provisions

This proposal is related to the proposals concerning Articles 16, 53, 56, and 60.

This proposal would support the GC Terms of Reference by incorporating, insofar as practicable, plea-bargaining practices and procedures applicable in federal district court into military justice practice. This proposal also supports the GC terms of Reference by considering the recommendations of the Response Systems Panel.

[26] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49 (June 2014) (Recommendation 117).

8. Legislative Proposal

SEC. 717. PLEA AGREEMENTS.

Subchapter VII of chapter 47 of title 10, United States Code, is amended by inserting after section 853 (article 53 of the Uniform Code of Military Justice) the following:

"§853a. Art. 53a. Plea agreements

"(a) IN GENERAL.—(1) At any time before the announcement of findings under section 853 of this title (article 53), the convening authority and the accused may enter into a plea agreement with respect to such matters as—

"(A) the manner in which the convening authority will dispose of one or more charges and specifications; and

"(B) limitations on the sentence that may be adjudged for one or more charges and specifications.

"(2) The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms and conditions of a plea agreement.

"(b) ACCEPTANCE OF PLEA AGREEMENT.—Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that—

"(1) in the case of an offense with a sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

"(2) in the case of an offense with no sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge of a general or special court-martial shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties;

"(2) contains a provision that is not understood by the accused; or

"(3) except as provided in subsection (d), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)).

"(d) LIMITED CONDITIONS FOR ACCEPTANCE OF PLEA AGREEMENT FOR SENTENCE BELOW MANDATORY MINIMUM FOR CERTAIN OFFENSES.—With respect to an offense referred to in section 856(b)(2) of this title (article 56(b)(2))—

"(1) the military judge may accept a plea agreement that provides for a sentence of bad conduct discharge; and

"(2) upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the military judge may accept a plea agreement that provides for a sentence that is less than the mandatory minimum sentence for the offense charged.

"(e) BINDING EFFECT OF PLEA AGREEMENT.—Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the military judge.".

9. Sectional Analysis

Section 717 would create a new section, Article 53a, transferring the statutory authority for plea agreements from Article 60 to the new Article 53a. The proposed new article would provide basic rules for: (1) the construction and negotiation of plea agreements concerning the charge and the sentence; (2) allowing the convening authority and the accused to enter into binding agreements regarding the sentence that may be adjudged at a court-martial; and (3) the military judge's determination of whether to accept a proposed plea agreement in a general or special court-martial. Under the amended statute, the military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful. The new statute would preserve current law pertaining to plea agreements involving offenses with mandatory minimum sentences.

Implementing rules for the new Article 53a would address a number of issues concerning plea agreements, including the structure and procedures for sentence agreements; the opportunity for negotiated sentencing ranges; a requirement that, if the military judge determines that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination; plea agreements in summary courts-martial; and the role of the victim in plea agreements, with particular emphasis on the rules structuring the convening authority's decision-making with respect to acceptance of plea agreements proposed by the defense.

Article 54 – Record of Trial
10 U.S.C. § 854

1. Summary of Proposal

This proposal would amend Article 54 to facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records and would facilitate the provision of courts-martial records to victims of crime.

2. Summary of the Current Statute

Article 54 requires a complete record of the proceedings and testimony: (1) in each general court-martial in which the sentence includes death, dismissal, a punitive discharge, or a punishment in excess of that which could be adjudged by special court-martial; and (2) when the adjudged sentence includes a punitive discharge, confinement for more than six months, or forfeitures of pay for more than six months. Under the statute, the military judge must authenticate the record of each general court-martial, subject to exceptions when the judge is unable to authenticate the record. The records of special and summary courts-martial are authenticated under rules prescribed by the President. Article 54(d) provides that a copy of the record of each general and special court-martial must be given to the accused as soon as it is authenticated. In a case involving rape, sexual assault, or another offense under Article 120, Article 54(e) provides that the record also must be given to the victim of the offense, without charge, if the victim testified at the proceedings.

Article 54 authorizes the President to prescribe rules and procedures concerning what must be included in courts-martial records of trial, and focuses on the authentication requirements for the record in each court-martial proceeding. The specific requirements for the preparation and content of records of trial are defined in Article 1(14) and the implementing rules. Article 1(14) defines "record" as an official written transcript, written summary, or other writing relating to the proceedings; or an official audiotape, videotape, or similar material from which sound, or sound and visual images depicting the proceedings may be reproduced. R.C.M. 1103 primarily implements Article 54.

3. Historical Background

When Congress enacted the UCMJ in 1950, Article 54 provided that each general court-martial was to keep a separate record of its proceedings, with a requirement that both the president of the court-martial and the law officer authenticate the record.[1] The President implemented this provision in the Manual for Courts-Martial with a requirement for a

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 512 (photo reprint 1920) (2d ed. 1896) (noting that the authentication requirement reflected practice dating from the 19th Century, in which the record was authenticated by both the president of the court-martial and the trial judge advocate).

verbatim record in general courts-martial.[2] In addition, subsection (b) of the original statute authorized the President to prescribe the contents and authentication requirements for special courts-martial. The President implemented this provision by requiring a verbatim transcript in special courts-martial that adjudged a bad-conduct discharge, and a summarized record in all other special courts-martial, along with a requirement for authentication of special courts-martial by the president of the court-martial and the trial counsel.[3] The legislation also directed that a copy of the record of the proceedings should be provided to the accused, with copies of all documentary exhibits.[4] In the Military Justice Act of 1968, Congress codified the records requirement in special courts-martial, and provided for authentication of the record of trial in general courts-martial by the signature of the military judge.[5]

In 1983, Congress amended Article 54 to include a new subsection (c) that required a "complete" record.[6] In the same legislation, Congress included a new definition in Article 1(14) for the term "record."[7] The "record" could include "an official audiotape, videotape, or similar material from which sound or sound and visual images, depicting the proceedings may be reproduced."[8] The purpose of this change was to "reflect modern trends by authorizing use of videotape and audiotape as a means of recording the proceeding in order to take advantage of the developing technology on use of such materials to serve as a record of trial or depositions."[9] Congress was concerned that the limitation on the record of trial to be in writing did not permit the military to "take advantage of the developing technology on use of audiotape, videotape, and similar materials to serve as a record of trial."[10] The Senate Report indicated that the Manual for Courts-Martial should provide procedures enabling trial and defense counsel to obtain transcripts of audio or visual materials where they are entitled to the record in connection with the convening authority's action.[11]

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[2] MCM 1951, ¶82*b*.(1).

[3] MCM 1951, ¶83.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 644 (1949).

[5] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[6] Military Justice Act of 1983, Pub. L. No. 98-209, § 6(c), 97 Stat. 1393.

[7] *Id.* at § 6(a). This change was enacted after *United States v. Barton*, 6 M.J. 16, 18 (C.M.A. 1978), in which the Court of Military Review held that videotapes could not be substituted for written or printed transcripts of trial proceedings. The court refused to review the proceeding because it determined that the videotapes did not constitute a "lawful record of trial."

[8] *Id*.

[9] S. REP. NO. 98-53, at 5-6 (1983).

[10] *Id.* at 25-26.

[11] *Id.*

The President implemented the 1983 amendments to Article 54 and Article 1(14) in R.C.M. 1103 of the 1984 MCM. The rule included a provision for recording courts-martial by videotape or audiotape, and also for preparation of a written record, with limited exceptions.[12] This preference for a written record was based on a consideration that written records would be easier to use and easier to produce in multiple copies.[13] In 2008, R.C.M. 1103 was changed to recognize that military exigencies could prevent preparation of a written transcript, in either its verbatim or summary form. In such cases, if an accurate record exists, the rule allows audiotape, videotape, or other material to be authenticated and forwarded in accordance with R.C.M. 1104 (Records of trial: Authentication; service; loss; correction; forwarding).

In NDAA FY 2012, Congress amended Article 54 to include a new subsection (e), similar to subsection (d), requiring that a copy of the record of court-martial proceedings be provided not only to the accused, but also to the victim in any case involving Article 120 offenses where the victim testified during the proceedings.[14] Under the statute, the record of the proceedings must be provided free of charge and as soon as the records are authenticated.

4. Contemporary Practice

The President has implemented Article 54 through R.C.M. 1103. Under current law, a "complete record" is required in each general and special court-martial in which the adjudged sentence included a dismissal or a bad-conduct discharge, or confinement or forfeitures greater than six months. R.C.M. 1103 defines a "complete record" as including a "verbatim transcript" of all sessions except sessions closed for deliberations and voting.[15] Summary courts-martial and special courts-martial with an adjudged sentence of less than six months and no bad-conduct discharge do not require a verbatim transcript, but may utilize a summarized report of the proceedings.[16] In addition, R.C.M. 1103 sets forth a list of "other matters" that must be included in the "complete record." The list includes, among other items, exhibits received in evidence, the charge sheet, and a copy of the convening order.[17] Currently, a complete record usually includes a substantially verbatim transcript, authenticated by a military judge.[18]

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[12] R.C.M. 1103(j).

[13] MCM, App. 21 (R.C.M. 1103, Analysis).

[14] NDAA FY 2012, Pub. L. No. 112-81, § 586(e), 125 Stat. 1298 (2011).

[15] R.C.M. 1103(b)(2)(D).

[16] R.C.M. 1103(b)(2)(C).

[17] R.C.M. 1103(b)(2)(D).

[18] R.C.M. 1103(b)(2)(B); *see* United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014) (whether a record is complete and a transcript is verbatim are questions of law that the appellate court reviews *de novo*); *id.* at 377 (a verbatim transcript need not be word for word, but must be "substantially verbatim").

Generally, the record for a general or special court-martial begins as an audio file that is transcribed by a court reporter or transcription service.[19] The transcript is normally first reviewed and corrected by the trial counsel, followed by the defense counsel, and finally reviewed and authenticated by the military judge.[20] The authenticated record is then copied and forwarded to the accused and to any victim of an offense under Article 120 who testified at the proceedings. Copies are usually standard paper copies, but some jurisdictions provide scanned copies of authenticated records of trial on compact disks instead of, or in addition to, paper copies.

5. Relationship to Federal Civilian Practice

The procedure for creating, maintaining, and distributing records of trial in federal criminal trials differs substantially from military practice. In federal civilian practice, although a verbatim record is kept in most cases, it is not transformed into a written document unless there is a request from a party or an appellate court for a transcript of designated portions of the record or the full record.[21] The record is certified by the reporter, not the trial judge. There is no requirement for either the prosecutor or the trial judge to conduct a line-by-line review or otherwise authenticate the accuracy of the record.[22] To the extent that a question arises about the accuracy of a specific portion of the record, it is addressed through a motion for correction.[23]

6. Recommendations and Justification

Recommendation 54.1: Amend Article 54 to require certification of the record by a court reporter.

This proposal would align military practice with the practice in federal civilian courts by placing the responsibility for certification of the record on the court reporter rather than on the prosecutor or presiding judge.

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[19] R.C.M. 503(e)(3)(B). *See* R.C.M. 808 (Discussion).

[20] R.C.M. 1103(i)(1)(A).

[21] 28 U.S.C. § 753(b); FED. R. CRIM. P. 11(g); FED. R. APP. P. 10(a). The federal record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings ordered by the appellant—either the entire transcript or a partial transcript, if any—and a certified copy of the docket entries prepared by the district clerk. It is the appellant's duty to order from the reporter a transcript of any parts of the proceedings not already on file that the appellant considers necessary for the appeal.

[22] *See* Mayer v. Chicago, 404 U.S. 189, 194 (1971) (holding that the Constitution requires a record of sufficient completeness to allow consideration of what occurred at trial, but not necessarily a verbatim transcript); 28 U.S.C. § 753(b) (requiring that each session of court be recorded verbatim by shorthand, mechanical means, electronic sound recording equipment, or "any other method" subject to regulations and the judge's discretion, the district court judge electing the method of recording).

[23] FED. R. CRIM. P. 36; FED. R. APP. P. 10(e).

In Part II of this Report, the proposed amendments to the rules implementing Article 54 will address the opportunity to file a motion to correct the record, utilizing procedures similar to those available in the federal civilian courts.

Recommendation 54.2: Amend Article 54 to require a complete record in any general or special court-martial in which confinement or forfeitures exceed six months.

Article 54, which currently requires a "complete record" in all cases involving death, dismissal, or a discharge, contains an anomaly with respect to cases involving confinement. The current law requires a complete record in all special courts-martial involving confinement or forfeitures in excess of six months irrespective of whether the sentence includes a discharge, but does not require a complete record in similar general courts-martial unless the period of confinement or forfeitures is greater than 12 months.[24] This proposal would require a complete record anytime a sentence includes death, dismissal, discharge, or confinement or forfeitures in excess of six months. Thus, the proposal would eliminate any distinction between the types of court-martial, to include the anomaly where the requirements for a complete record are less stringent at a general court-martial than at a special court-martial. Part II of this Report will address the requirements for the record in other cases that are subject to review in the Court of Criminal Appeals.

As under current law, the requirements for a "complete" record will be set forth by the President in the R.C.M. Part II of the Report will address these rules, including the circumstances under which a written transcript will be prepared and the procedures for preparing a written transcript. In the near term, the rules will provide for the availability of a written transcript during the appellate process in the types of cases in which a written transcript is available under current military practice, subject to rules similar to the federal rule for requesting all or part of a transcript.[25]

Part II of the Report will also address the potential in the future for use in the appellate process of electronic transcriptions to the extent that the development and use of such technology for legal proceedings provides for increasing comfort and familiarity with electronic formats.

Recommendation 54.3: Amend Article 54 to provide all victims who testify at a court-martial with access to records of trial.

This proposal would amend Article 54 to provide that all victims who testify at court-martial would be entitled to access to the record of trial. Currently, only victims of sex-related offenses under Article 120 are entitled to such access.

[24] In practice, R.C.M. 1103(b)(2)(B) requires a verbatim transcript in a general court-martial whenever the sentence exceeds six months.

[25] FED. R. APP. P. 10(b).

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating the practices used in federal district courts insofar as practicable in military practice. By allowing the services to certify a verbatim recording, whether that means audio, video, or any other method, the proposal will allow the military services to take advantage of developing technology, especially in the area of voice recognition software.

The proposal reflects an opportunity to reduce the need for review of written records, as a result of changes in appellate procedures recommended elsewhere in this Report. To the extent that the services decide to retain procedures not required by statute—especially for purposes of transition—they may choose to do so.

This proposal is related to the proposed changes in Articles 60, 66, and 69. The proposed amendments would streamline the preparation and distribution of the record of trial, in light of the convening authority's reduced scope of post-trial review. The proposals for Articles 66 and 69 recommend revising the current appellate system into an appeal of right model. A written transcript would be needed only to the extent necessary for the accused to determine whether to file an appeal, the government to respond to a filing, and the court to decide the appeal. While a verbatim transcript of the trial may be needed in many cases, it would not be needed in all cases.

8. Legislative Proposal

SEC. 718. RECORD OF TRIAL.

Section 854 of title 10, United States Code (article 54 of the Uniform Code of Military Justice), is amended—

(1) by striking subsection (a) and inserting the following:

"(a) GENERAL AND SPECIAL COURTS-MARTIAL.—Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a court-reporter, except that in the case of death, disability, or absence of a court reporter, the record shall be certified by an official selected as the President may prescribe by regulation.";

(2) in subsection (b)—

(A) by striking "(b) Each special and summary court-martial" and inserting "(b) SUMMARY COURT-MARTIAL.—Each summary court-martial"; and

(B) by striking "authenticated" and inserting "certified";

(3) by striking subsection (c) and inserting the following:

"(c) CONTENTS OF RECORD.—(1) Except as provided in paragraph (2), the record shall contain such matters as the President may prescribe by regulation.

"(2) In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.".

(4) in subsection (d)—

(A) by striking "(d) A copy" and inserting "(d) COPY TO ACCUSED.— A copy"; and

(B) by striking "authenticated" and inserting "certified"; and

(5) in subsection (e)—

(A) by striking "involving a sexual assault or other offense covered by section 920 of this title (article 120)" in the first sentence and inserting "upon request,"; and

(B) by striking "authenticated" in the second sentence and inserting "certified".

9. Sectional Analysis

Section 718 would amend Article 54, which provides the basic rules and procedures for producing, authenticating, and distributing records of proceedings in general, special, and summary courts-martial. The amendments would facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records. The use of this technology would streamline preparation and distribution of the

record of trial in light of recent amendments that reduce or eliminate post-trial proceedings under Article 60. In addition, the proposed amendments would increase the availability of court-martial records to victims of crime.

The amendments to Article 54 would: (1) require the court reporter, instead of the military judge or the prosecutor, to certify the record of trial; (2) require a complete record of trial in any general or special court-martial if the sentence includes death, dismissal, discharge, or confinement or forfeitures for more than six months; and (3) provide all victims who testify at a court-martial with access to records of trial, eliminating the distinction in the statute that currently provides such access only to victims of sex-related offenses under Article 120.

Changes in the rules implementing Article 54 would address the opportunity to file a motion to correct the record, utilizing procedures similar to those available in the federal civilian courts. Implementing rules also would address the rules for providing a "complete" record of trial, including the circumstances under which a written transcript will be prepared and the procedures for preparing a written transcript. In the near term, the statute's implementing rules would provide for the availability of a written transcript during the appellate process in the types of cases in which a written transcript is available under current military practice, subject to rules similar to the federal rule for requesting all or part of a transcript. Implementing rules also would address the potential in the future for use in the appellate process of electronic transcriptions to the extent that the development and use of such technology for legal proceedings provides for increasing comfort and familiarity with electronic formats.

Subchapter VIII. Sentences

Article 55 – Cruel and Unusual Punishment Prohibited
10 U.S.C. § 855

1. Summary of Proposal

This Report recommends no change to Article 55. Part II of the Report will consider whether any changes are needed in the rules implementing Article 55.

2. Summary of the Current Statute

Article 55 prohibits any cruel and unusual punishment in the armed forces. Article 55 specifically prohibits the historical military punishments of flogging, branding, marking, or tattooing on the body. Also prohibited is the use of irons or handcuffs, except for the purpose of safe custody.

3. Historical Background

Article 55 was included in the UCMJ as enacted in 1950. It incorporated then-present Army and Navy provisions prohibiting flogging, branding, marking or tattooing as forms of punishment.[1] It has remained unchanged since the UCMJ's enactment.[2]

4. Contemporary Practice

Under current law, the primary test military appellate courts use for determining whether punishment qualifies as "cruel and unusual" is whether the conditions can be said to be cruel and unusual under contemporary standards of decency.[3] Such conditions include, but are not limited to: (1) conditions which result in a clear and serious deprivation of basic human needs; (2) conditions which deprive inmates of the minimal civilized measure of life's necessities; and (3) conditions which result in punishment grossly disproportionate to the inmate's offenses.[4] In practice, the President's limitation on authorized punishments in R.C.M. 1003 has made appellate litigation on what constitutes cruel and unusual punishment rare.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1087 (1949); *see also* Article 45 of the 1948 Articles of War; PROF. EDMUND MORGAN, TEXT OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY AS IT WILL APPEAR AFTER AMENDMENT BY H.R. 3687 AND S.1338 (star reprint) 19-20 (1947), *available at* http://www.loc.gov/mwg-internal/de5fs23hu73ds/progress?id=islDXo5-hxJA5Gp97zqfO1D7zPv-RrEpNdbfs1IeRQ, (last accessed 16 March 2015).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] United States v. Martinez, 19 M.J. 744, 748 (A.C.M.R. 1984) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[4] *Martinez*, 19 M.J. at 748 (citing Weems v. United States, 217 U.S. 349, 367 (1910)).

5. Relationship to Federal Civilian Practice

Article 55 is similar to the Eighth Amendment of the Constitution, which states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.[5]

6. Recommendation and Justification

Recommendation 55: No change to Article 55.

In view of the well-developed case law addressing Article 55's provisions, a statutory change is not necessary.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 55.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] U.S. CONST. amend. VIII.

Articles 56-56a – Maximum and Minimum Limits & Sentence of Confinement for Life without Eligibility for Parole

10 U.S.C. §§ 856-56a

1. Summary of Proposal

This proposal would align court-martial sentencing procedures with this Report's proposal for judicial sentencing in all noncapital general and special courts-martial. The proposal would enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system.

The sentencing reforms proposed by this Report are made possible by the amendments to Article 53 providing for judicial sentencing, and come in three parts.

First, as discussed in the proposal for Article 53, the current adversarial sentencing process (which utilizes many of the same procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. Part II of this Report will set forth the rules for such sentencing proceedings, taking into account the interests of the government, the accused, and any victims in having a thorough, balanced, and transparent proceeding.

Second, this proposal would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without the need to identify which portions of the sentence are attributable to which offense. Under the proposal, which follows the practice used in most civilian proceedings, the judge would pronounce a distinct sentence for those portions of a sentence that can be segmented and attributed to a specific offense—confinement and fines—with a requirement to designate whether any segmented portions will run concurrently or consecutively in the sentence.

Third, this proposal implements sentencing parameters and criteria to guide the discretion of the military judge in determining a sentence for each guilty finding. This proposal would establish a Sentencing Parameters and Criteria Board to develop parameters and criteria. The sentencing parameters and criteria proposed by the Board would be subject to approval by the President. As in many civilian courts, a parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board would establish sentencing criteria for those offenses without parameters. The implementation of

parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance.

This proposal provides for a four-year period to develop sentencing parameters and criteria. This four-year implementation period allows for the Board to collect and analyze sentencing data—especially the data made available after the implementation of segmented sentencing.

2. Summary of the Current Statute

Article 56 provides the authority for the President to set maximum punishments for UCMJ violations. The President has exercised this authority in two ways: First, the President has limited the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003, which prohibits punishments other than reprimands, forfeitures, fines, reductions in grade, restriction, hard labor, confinement, punitive discharges, and death. Second, for most offenses, the President has limited the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed. The President's authority is subject to any maximum or mandatory punishments Congress establishes in the UCMJ.

Article 56(b), added to the statute in 2014, mandates that an accused convicted of certain sex offenses (and attempts of those crimes), be discharged from the military with a dishonorable discharge or a dismissal. An enlisted accused who pleads guilty to rape or sexual assault may receive a bad-conduct discharge, in lieu of a dishonorable discharge, as a term of a plea agreement.

Article 56a authorizes the punishment of confinement for life without the possibility of parole any time confinement for life is an authorized punishment. A sentence to life without parole may be reduced only by: (1) the convening authority, pursuant to a pretrial agreement;[1] (2) the convening authority, upon recommendation of trial counsel after the accused has provided substantial assistance in another investigation or prosecution;[2] (3) the appellate courts;[3] (4) the Service Secretary (personally, and non-delegable);[4] or (5) through a pardon by the President.[5]

3. Historical Background

The sentencing procedures in courts-martial have changed substantially throughout the history of military law. Under the early Articles of War, sentences were determined by

[1] 10 U.S.C. § 860(c)(4)(C).

[2] 10 U.S.C. § 860(c)(4)(B).

[3] 10 U.S.C. § 866(c); 10 U.S.C. § 867; 10 U.S.C. § 867a.

[4] 10 U.S.C. § 874(a).

[5] *See* Article 60(c)(4) (Action by the Convening Authority); Article 66(c) (Review by Court of Criminal Appeals); Article 67 (Review by the Court of Appeals for the Armed Forces); Article 67a (Review by the Supreme Court); U.S. CONST. art. II, § 2 (Presidential pardon power).

majority vote.[6] Although the Articles of War provided for several mandatory sentences,[7] most offenses were punished entirely within the discretion of the court-martial. In 1890, Congress authorized the President to establish maximum sentences in times of peace.[8]

When the UCMJ was enacted in 1950, Congress provided the President with the authority to promulgate rules on sentencing under Article 36; in Article 56, Congress specifically authorized the President to determine the maximum punishments for violations of the UCMJ.[9] As originally enacted, the only offenses in the UCMJ that included mandatory minimum sentences were premeditated murder (life in prison); felony murder (life in prison) and spying (mandatory death).[10] In 1960, Congress enacted Article 58a to establish mandatory reductions for the enlisted grades as a collateral effect of a court-martial sentence, subject to exceptions in Service regulations.[11] In 1996, Congress enacted Article 58b to require mandatory forfeitures, if not adjudged at trial, during certain periods of confinement.[12] In 1997, Congress enacted Article 56a, to provide for the punishment of confinement for life without parole and restricted clemency authority for such sentences.[13] In 2013, Congress amended Article 56 to provide for mandatory punitive discharges for rape and sexual assault.[14]

There is no specific statutory requirement for restitution as part of court-martial practice, although restitution has been recognized as a valid term of a plea agreement since at least 1977.[15] When Congress enacted the Mandatory Victims Restitution Act of 1996, it did not specifically address victims of crimes tried by courts-martial.[16]

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[6] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 391-92 (photo reprint 1920) (2d ed. 1896).

[7] *See, e.g.,* AW 14 of 1895 ("Any officer who knowingly makes a false muster of man or horse . . . shall, upon proof thereof by two witnesses . . . be dismissed from the service").

[8] 26 Stat. 491, ch. 998 (1890); *see also* Carter v. McClaughry, 183 U.S. 365, 381-82 (1902) (Writ of habeas corpus filed from Fort Leavenworth when court-martial sentence exceeded maximum authorized by the President).

[9] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[10] *Id.*

[11] Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468.

[12] NDAA FY 1997, Pub. L. No. 104-201, § 1068, 110 Stat. 2655 (1996).

[13] NDAA FY 1998, Pub. L. No. 105-85, §S 581-82, 1073(a)(9)-(11), 111 Stat. 1759, 1900 (1997). The limitations on clemency were passed in 2000 and are contained in Article 74.

[14] NDAA FY 2014, Pub. L. No. 113–66, § 1705(a)(1), (2)(A), 127 Stat. 672 (2013). This amendment also provided for mandatory minimum sentences for convictions for rape and sexual assault of a child, forcible sodomy, and attempts of these offenses.

[15] *See* United States v. Brown, 4 M.J. 654, 655 (A.C.M.R. 1977).

[16] *See* 18 U.S.C. § 3663A.

4. Contemporary Practice

Currently, military practice utilizes unitary sentencing, in which a court-martial adjudges a single sentence for the accused, regardless of the number of offenses for which the accused has been found guilty. This practice is specifically required by the Rules for Courts-Martial,[17] and is implicitly required by Article 52's requirement for panel voting.[18] If the accused has been found guilty of multiple offenses, the maximum authorized sentence is the sum of the maximum punishments for all offenses individually.[19]

R.C.M. 1002 provides the rule for sentence determination in courts-martial. The rule states that the sentence "is a matter within the discretion of the court-martial." Pursuant to this rule, except for the few offenses that have mandatory minimum sentences—which include premeditated murder and the sexual offenses described earlier—the court is free to arrive at a sentence anywhere from no punishment to the maximum established by the President under Article 56(a). The appropriate sentence for an accused is generally within the discretion of the court-martial, and the court may adjudge any lawful sentence, from no punishment to the maximum established by the President. With a few exceptions, there are few constraints on the discretion of the sentencing authority in courts-martial.

With respect to restitution, under current law, victims who suffer property losses are allowed to file a claim for payment under Article 139. However, such claims are not part of the formal court-martial process, and are limited to instances of willful destruction of property. Article 139 claims do not cover, for example, medical bills, missed wages, or other economic losses recoverable in federal court.[20] Under current practice, restitution is addressed primarily through the use of pretrial agreements between the convening authority and the accused.[21]

5. Relationship to Federal Civilian Practice

Military practice and federal civilian practice differ significantly in the areas of sentence determination, restitution, and appeals of sentences.

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[17] R.C.M. 1006(c).

[18] To sentence an accused to more than ten years confinement requires a concurrence of three-fourths of the panel members. A sentence of less than 10 years requires a two-thirds concurrence. These voting requirements would not work in a non-unitary sentencing model, for example, when each individual sentence was less than 10 years but the combined sentence was more than 10 years. Additionally, a single sentence has long been military practice. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 404 (photo reprint 1920) (2d ed. 1896).

[19] R.C.M. 1003(c)(1)(C).

[20] Article 139 claims provide superior victim rights to restitution awarded in federal court in one limited manner: they generally require proof only by a preponderance of the evidence that the accused committed the alleged offense.

[21] R.C.M. 705(c)(2)(C).

Prior to the Sentencing and Reform Act of 1984,[22] a federal district judge exercised "virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction."[23] During the 1970s and 1980s, academics, the public, and eventually policymakers grew concerned about sentencing disparities in the federal courts. A political consensus arose in the early 1980s that the prevailing system of indeterminate sentencing no longer adequately fulfilled the primary objectives of the criminal justice system. Criticisms of the system at the time echo current criticisms of courts-martial and included sentencing disparity and loss of public confidence.[24] In 1984, Congress established the U.S. Sentencing Commission, directing it to create federal sentencing guidelines.

Statutory provisions required the original Commission to promulgate a sentencing guidelines grid, based on the offense and criminal history of the defendant, with 258 different "boxes." While initially intended as binding, the Supreme Court later declared mandatory guidelines unconstitutional as a violation of the Sixth Amendment.[25] Since the Court's *Booker* decision, the guidelines have been advisory only; district courts are required to take them into account, but are not bound to apply them when determining an appropriate sentence for an accused. Federal judges may depart upward or downward from an advisory sentencing range for an offense due to "an array of mitigating and aggravating factors listed under 18 U.S.C. § 3553(b)"—including circumstances not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.[26] The federal

[22] 18 U.S.C. § 3551 *et. seq.*

[23] Frank O. Bowman, *The Quality of Mercy must be Restrained, and other Lessons in Learning to Love the Federal Sentencing Guidelines,* 1996 WIS. L. REV. 679, 682 (1996). Professor Bowman served as Special Counsel to the U.S. Sentencing Commission.

[24] *See id.* ("A variety of complaints arose about this [pre-sentencing guidelines] system. First, critics said that it led to tremendous sentencing disparity. . . . Second, critics believed that plea bargaining exacerbated the potential for disparity between similarly-situated defendants. . . . Third, critics observed that because of the parole system, the real power to determine the length of time a defendant actually spent in prison rested not with judges, prosecutors, defense attorneys or legislators, but with a parole board that operated substantially out of public view. . . . Fourth, indeterminate sentencing was thought to erode public faith in the criminal justice system. Because defendants rarely served anything close to the amount of time the judge announced, observers unfamiliar with the system's rituals saw the system as fraudulent. . . . Fifth, observers had the sense that lazy prosecutors were indiscriminately plea bargaining away cases against vicious criminals to reduce their workloads, and that soft judges were letting criminals get away with minimal sentences. . . . Finally, I suspect that all these critiques rooted in concerns about fairness would not have led to global reform if people felt that the system worked, in the sense that it reduced or controlled crime.") (internal citations omitted).

[25] United States v. Booker, 543 U.S. 220 (2005).

[26] Kimbrough v. United States, 552 U.S. 85, 105 (2007); *see also* Gall v. United States, 552 U.S. 38, 51 (2007); United States v. Booker, 543 U.S. 220, 233 (2005).

guidelines have been criticized on a variety of grounds, including for being unnecessarily complex.[27]

In brief, the federal sentencing guidelines operate as follows:

As with courts-martial, in federal district court the maximum sentence is determined by the statute criminalizing the offense. The appropriate sentence range is often determined by judicial fact-finding, made with the aid of a presentence report. The guideline range is determined by two factors: (1) the defendant's criminal history category; and (2) the offense level.

A defendant's criminal history category is determined by the defendant's previous interactions with the criminal justice system. A defendant who previously received substantial prison sentences, or who committed the current offense while still under probation, will receive a higher criminal history category, and in most cases a higher sentencing guideline range.

The U.S. Sentencing Guidelines assign most criminal violations of federal law an offense level ranging from 1-43. The offense level is adjusted based on the severity of the crime, victim status, the role of the defendant in the crime, and the defendant's acceptance of responsibility, among other factors. If the defendant played a small role in the offense, assisted the prosecution, and took responsibility for his role in the crime, the offense level can be decreased substantially. Thus, two defendants convicted of the same offense may face different sentencing guideline ranges based on the manner in which they committed the offense and their prior criminal histories. Different charging decisions, different government priorities, and the exercise of sentencing discretion by different judges may also result in markedly different sentences, even if two individuals are sentenced within the guideline range for the same offense.

Generally, the federal judge will repeat this process for every offense, although there are rules for grouping offenses—for example, offenses involving the same victim and the same act. Although the judge is required to consider the sentencing guidelines, the judge is not required to apply the guidelines when determining the appropriate sentence for a defendant. In addition, federal civilian judges must determine whether multiple terms of imprisonment imposed on a defendant will run concurrently or consecutively.[28]

With respect to restitution, federal law provides for mandatory restitution for victims of crimes of violence, crimes against property, and any crime for which the victim suffers a pecuniary loss.[29] Restitution is determined as part of the sentencing proceedings,[30] and

[27] Erik S. Siebert, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867 (2010).

[28] 18 U.S.C.S. § 3584.

[29] *See* 18 U.S.C. § 3663A (mandatory restitution); § 3664 (enforcement); and §§3612-3614 (collection and penalties for failure to pay). Federal courts of appeal are split on whether restitution is a punishment or civil remedy. *See* Paroline v. United States, 134 S. Ct. 1710, 1724 (2014) (Aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from

may include the return of property; compensation for damaged or destroyed property; compensation for medical bills, physical therapy, occupational therapy, and professional services (including psychiatric care); and compensation for income lost as a result of the offense.[31] Restitution is ordered without consideration of the defendant's ability to pay,[32] and a defendant who defaults on a restitution payment may be resentenced, or the court may order the sale of the defendant's property and impose civil remedies.[33]

With respect to sentencing appeals, in federal civilian practice both the government and defense may appeal a sentence if it is unreasonable.[34] A government appeal of a sentence may not be prosecuted without the approval of the Solicitor General or Deputy Solicitor General.[35]

6. Recommendation and Justification

Recommendation 56.1: Amend Article 56 to replace the court-martial practice of "unitary" sentencing with "segmented sentencing" where, if confinement is adjudged for guilty findings, the amount of confinement for each guilty finding would be determined separately. This proposal also would provide for segmented sentencing for fines.

This proposal would increase transparency in military sentencing by allowing the parties and the public to know the specific punishments for each offense. Additionally, for cases involving a victim (or multiple victims), identifying the sentence associated with their injury may provide clarity and increase confidence in the results of the court-martial.

(though they overlap with) the purposes of tort law); Kelly v. Robinson, 479 U. S. 36, 49, n.10 (1986) (noting that restitution is, inter alia, "an effective rehabilitative penalty"); United States v. Serawop, 505 F.3d 1112, 1122-1123, (10th Cir. 2007) (finding restitution is not punitive and summarizing the circuit split).

[30] Prior to sentencing, the district court directs a probation officer to collect, (as part of the presentence report or as a separate document), sufficient information for the court to fashion an appropriate restitution order. Each defendant is required to file an affidavit describing his or her financial resources with the probation officer. The government provides the probation officer with the amount of restitution due each victim. Victims may also independently provide input. The court may request additional information, and may receive evidence in camera. The burden is on the government to establish the amount of loss sustained by a victim; the burden of establishing the financial resources of the defendant is on the defense. 18 U.S.C. § 3664(a), (d)(2)-(4).

[31] 18 U.S.C. § 3663A(c).

[32] 18 U.S.C. § 3663A(f)(1)(A). Restitution may be ordered to be paid as a lump sum, in installments, or even in-kind services. If there are multiple defendants, the court may order each defendant liable for the full amount. If the defendant knowingly fails to pay restitution, the court may resentence the defendant to any sentence which may have been originally imposed, but may not increase punishment if the failure to pay is "solely" because of the defendant's indigence. 18 U.S.C. § 3664(f)(3)(A).

[33] 18 U.S.C. § 3614; 18 U.S.C. § 3613(f).

[34] United States v. Booker, 543 M.J. 220 (2005).

[35] 18 U.S.C. § 3742(b)(4).

On appeal, segmented sentencing will increase the efficiency of appellate review and may result in fewer remands for resentencing. Under current law, when an appellate court sets aside a guilty specification, the appellate court can reassess the sentence if it can be assured "that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed."[36] If not, the case may be remanded for a new sentencing proceeding. Non-unitary sentencing would simplify this burden for appellate courts.

Segmented sentencing should provide practitioners and policy makers with more accurate information about punishments in courts-martial, particularly in the development and refinement of sentencing parameters and criteria. As most cases involve convictions for more than one offense, it is challenging to assemble reliable sentencing data in courts-martials. More accurate data would allow policy makers to know how the sentencing system is functioning, which is a significant prerequisite to evaluating its effectiveness and proposing changes.

Segmented sentencing requires protections to ensure that an accused is not unfairly sentenced twice for what is essentially one offense. This proposal therefore also would require that the military judge determine whether terms of confinement will run concurrently, or consecutively. Under segmented sentencing, an accused convicted of two offenses would receive a term of confinement appropriate for each offense. If the offenses involved the same transaction, victim, and harm, the sentence could be overly severe for what was essentially one criminal act. This is of special concern in the military justice system where the UCMJ has several ambiguous offenses, unknown in the civilian practice, that increase the potential for unreasonable multiplication of charges;[37] where prosecutors are expected to charge all known offenses at a single trial;[38] and the accused must reach a high bar to have charges severed.[39]

Under the proposed amendments, military judges would need to make a determination, on the record, as to the appropriate amount of confinement for each offense. At the same time, the military judge would determine whether the sentences should run concurrently or consecutively. This proposal is rooted in the federal system, where federal district courts generally have broad discretion to impose a consecutive or concurrent sentence.[40] The

[36] United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986).

[37] *See e.g.,* Articles 89-92, UCMJ (disrespect, disobedience, and dereliction offenses); Article 133, UCMJ (conduct unbecoming an officer); Article 134, UCMJ (the General Article).

[38] *See* R.C.M. 601(e)(2) (Discussion) ("Ordinarily all known charges should be referred to a single court-martial.").

[39] *See* R.C.M. 906(b)(10) (Accused must show "manifest injustice" for severance of charges).

[40] Sester v. United States, 132 S.Ct. 1463, 1468 (2012); 18 U.S.C. § 3584. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission. For example, under U.S. Sentencing Guidelines § 3D1.1 and 3D1.2, all counts involving "substantially the same harm" are grouped together into a single group if they 1) involve the same victim and the same act or transaction; 2) involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a

Supreme Court has made clear, however, that double-jeopardy principles prohibit imposing consecutive sentences for "the same offense," unless the legislature specifically authorizes multiple sentences.[41]

This proposal would not apply segmented sentencing to unique military punishments that affect the accused's status in the service (e.g., discharges, forfeitures, reductions in pay grade, or reprimands). These punishments are best determined by looking at the sum of the accused's crimes in relation to the accused's potential for future service. The case of a servicemember convicted of more than one minor offense, for example, may warrant a punitive discharge, even though no one offense, standing alone, would warrant such punishment.

Recommendation 56.2: Establish sentencing parameters and criteria to provide guidance to military judges in determining an appropriate sentence.

This proposal would establish a more structured sentencing system that draws upon practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines, while utilizing an approach that reflects that an effective military justice system requires a range of punishments and procedures that have no direct counterpart in civilian criminal trials.

Criminal sentencing systems face two competing goals: consistency and individualized consideration. Consistency in sentencing (similar offenses by similar accused receiving similar sentences) may serve to increase deterrence, predictability, and public confidence in criminal sentences. Individualized sentencing tailors a sentence to the accused and the particular circumstances of his or her crime. Despite similar goals, direct application of the U.S. Sentencing Guidelines presents several concerns. First, military judges do not have the equivalent logistical support and staff to mirror the duties of a federal district court.[42] Second, federal sentencing guidelines were developed for federal crimes. While the UCMJ

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common scheme or plan; 3) when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts; and 4) when the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of the substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. *See* United States Sentencing Guidelines, § 3D1.2.

[41] *See* Missouri v. Hunter, 459 U.S. 359, 368 (1983) (Where unequivocal legislative intent was to impose consecutive sentences for even arguably same conduct, such sentences do not violate double-jeopardy principles); Albernaz v. United States, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.").

[42] The Administrative Office of the United States Courts has over 32,000 employees, with almost 100,000 criminal cases processed each year. The military justice system, by contrast, tried less than 2500 cases in 2013, and military judges often cover a large geographical area and may not even have a single clerk. http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx; http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-caseload-indicators.aspx; Annual Report Submitted to the Committees on Armed Services of the U.S. Senate and the House of Representatives (2013).

includes offenses common to the federal code, many offenses are unique to the military and have no counterpart in civilian criminal law. Third, military justice has as an additional purpose: the maintenance of good order and discipline. Finally, military justice has traditionally focused on rehabilitation, to include the possibility of return to service in appropriate cases, and most offenders have no prior criminal record. As an overriding constraint, a court-martial sentencing scheme must be effective during peacetime and war, state-side and overseas.

In view of these considerations, this proposal differs from the approach taken in the U.S. Sentencing Guidelines in several key respects:

First, the proposal would establish a maximum of 12 offense categories, as compared to the 43 in the US Sentencing Guidelines. Broad offense categories ensure that there is a sufficiently large sentencing range to capture an offense. With no more than 12 categories to cover offenses from petty theft to premeditated murder, each offense category must be broad.

Second, this proposal would require that the sentencing parameter for any given offense be based on the offense at findings, not on other factors. Under the U.S. Sentencing Guidelines, a defendant's guideline sentence is often based on judicial fact-finding made during the presentencing proceeding. In the extreme situation, a federal judge can find, by a preponderance of the evidence, that the defendant committed additional misconduct—and therefore deserves a higher offense category—even if the jury acquitted him of that same misconduct.

Third, some military unique offenses are unsuitable for parameters entirely. Some military offenses are so varied in their nature that they escape any reasonable categorization. The effect of disobeying an order ranges from the trivial to the perilous, and this fact is reflected in the range of lawful punishment.

A sentencing system in the military must reflect the unique offenses under the UCMJ, and must serve the dual goals of justice and discipline. This proposal is therefore designed around the key principle of flexibility. A military sentencing scheme must be flexible enough to adjudge any lawful sentence when appropriate. Crimes committed in combat, for example, may severely aggravate an offense if the accused put the unit or mission at risk, or may mitigate an offense committed during or after intense operations. Courts-martial, while often trying crimes similar to those in civilian courts, need to have the flexibility to impose an appropriate sentence stemming from extreme situations (or unique military contexts).

Accordingly, this proposal directs the establishment of two forms of guidance for military judges in determining an appropriate sentence: "sentencing parameters" and "sentencing criteria." A sentencing parameter would provide an upper and lower limit on the sentence that may be imposed, but one that the military judge could depart from when warranted by the facts of a case and to fashion an individualized sentence for the offender. Sentencing criteria would consist of factors that aggravate or mitigate the severity of an offense and

that the military judge must consider, but would not constrain the development of an appropriate sentence.

In short, this proposal would retain flexibility in sentences, recognizing the unique offenses and circumstances of military justice; it would continue the current emphasis on rehabilitation of an accused; and it would alter current practice by providing guidance to the judge on how to fashion an appropriate sentence.

The proposal would be implemented as follows:

Interim Period. This Report's proposals generally become effective one year after enactment. For sentencing parameters and criteria, this proposal calls for implementation within four years of enactment. This transitional period allows time for the Board to collect and analyze sentencing data, propose sentencing parameters and criteria, and submit the proposals to the President for approval. This proposal also requires the President to establish interim guidance during this period until parameters become effective.

Sentencing Parameters and Criteria Board. Upon enactment, the proposed amendment of Article 56 would establish a Board within the Department of Defense to develop sentencing parameters and criteria, as well as review and recommend changes to sentencing rules and procedures. The Board would develop and propose either sentencing parameters or criteria for all military offenses. Proposals for sentencing parameters and criteria would require approval by the President to take effect. The five-member board would be composed of the chief trial judge from each service (plus a designated trial judge from either the Navy or Marine Corps, depending on the service affiliation of the chief trial judge of the Navy-Marine Corps Trial Judiciary). The Secretary of Defense would designate one member to serve as Chair, and one as Vice-Chair. *Ex-officio* members would be designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the Department of Defense General Counsel. Board members would serve as a collateral duty. The Department of Defense would provide a full-time staff. The Board's proposals would be developed in consultation with advisory groups comprised of senior officers and enlisted members and practitioners selected by the services.

Sentencing Parameters. The proposal for Article 56 requires, within four years of enactment, the establishment of sentencing parameters for most offenses under the UCMJ. Similar to federal sentencing guidelines, a sentencing parameter anchors the discretion of a military judge within a specified range, but allows the military judge to exercise discretion in deviating from the established parameter.

Sentencing Criteria. For military unique offenses unsuitable for sentencing parameters this proposal would require the development of sentencing criteria. Sentencing criteria are offense specific factors that the military judge must consider in determining a proper sentence, but that do not direct a particular sentence. Sentencing criteria apply to all offenses for which a sentencing parameter is not established. Sentencing criteria may also provide guidance about when a punishment is appropriate or inappropriate, and the proper consideration of collateral effects of a sentence. For example, a punitive discharge

deprives a servicemember of substantially all benefits administered by the Department of Veterans Affairs and the Department of Defense. In cases with a retirement eligible accused, a punitive discharge deprives the accused, and their dependents, of receiving retired pay and benefits.[43] Sentencing criteria established by the President could assist the military judge in determining how to determine an appropriate sentence, but would not direct any particular sentence.

When sentencing parameters and criteria take effect, this proposal would sunset the mandatory punitive discharge provisions in Article 56(b). This would eliminate a current incongruity in the system where designated sex offenses result in mandatory discharge, but there is no equivalent mandatory discharge for other serious crimes such as murder. Mandatory discharges have the potential to distort sentencing proceedings in an undesirable fashion. As a collateral consequence of a dishonorable discharge or dismissal an accused loses essentially all benefits administered by their Service and the Department of Veterans Affairs. The mandatory discharge provisions prohibit alternative resolutions of a case (such as confinement and administrative separation). A purpose of establishing sentencing parameters is to provide sufficient guidance to military judges as to make mandatory minimum sentences unnecessary. This recommendation, combined with the proposal to allow for government appeals of sentences, provides sufficient protections against improper sentences, but also eliminates the current incongruity where only one type of offense has a mandatory discharge.

Appeals. Under this proposal, Article 56 would address the standards for appealing sentences. Both the government and the accused could appeal a sentence, although under different circumstances. Both the government and the accused could file an appeal if the sentence was unlawful, incorrectly calculated, or plainly unreasonable. The government would not be permitted to file an appeal during the interim period prior to the establishment of sentencing parameters, and an appeal by the government after parameters are established would require the approval of the Judge Advocate General.

The general structure of this subsection is adopted from 18 U.S.C. § 3742, with modifications that reflect military practice.

Recommendation 56.3: Incorporate Article 56a into Article 56 without substantive change.

Article 56a allows for a sentence of confinement for life without the eligibility of parole any time a life sentence is authorized. The article also specifies the limited circumstances under which a sentence to life without parole can be reduced. Relief is limited to action under Article 60, appellate review, a Presidential pardon, and clemency personally granted by the Service Secretary under Article 74.[44] Clemency by the Secretary may not be taken until after 20 years.

[43] *See, e.g.* Army Pamphlet 27-9 ("Military Judges' Benchbook") pg. 104, 10 September 2014.

[44] The 2014 amendment to Article 60 limited the convening authority's power to reduce the punishment in most serious offenses (i.e. a case where LWOP was adjudged).

This Report does not recommend any substantive change to Article 56a, but as part of the review of the UCMJ recommends that Article 56a be incorporated into Article 56, and that Article 56a be stricken.

Recommendation 56.4: Additional study of restitution in courts-martial.

Article 6b(a)(6) provides that a victim has the "right to receive restitution as provided in law." As a matter of current practice, non-statutory restitution may be included in pretrial agreements in guilty plea cases,[45] and a limited form of restitution related to property damage is available outside the sentencing process in the form of deductions from pay under Article 139. The congressionally-chartered Judicial Proceedings Panel is considering whether additional options for restitution should be provided in connection with sexual offense proceedings.[46] Given the limited jurisdiction of courts-martial over personal property and assets, it may be necessary to consider options outside the military sentencing process, and beyond the scope of this Report, for purposes of developing an effective restitution program. Because such options would include consideration of administrative and judicial procedures outside the military justice system, this Report recommends that development of any statutory changes regarding restitution take place after the Judicial Proceedings Panel presents its recommendations.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by more closely aligning the UCMJ with federal civilian practice, while accounting for unique circumstances specific to military practice.

The substantive recommendations in this proposal assume enactment of this Report's proposal for judge-alone sentencing, as sentencing parameters and non-unitary sentencing are infeasible for panels. First, the instructions necessary for a panel to implement sentencing parameters would be onerously complex. Second, the voting requirements would be difficult to apply if the panel were to vote on individual sentences for each offense.

8. Legislative Proposal

SEC. 801. SENTENCING.

(a) IN GENERAL.—Section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended to read as follows:

[45] *See, e.g.*, R.C.M. 705(c)(2)(C).

[46] *See* NDAA FY 2014, Pub. L. No. 113- 66, § 1731(b)(1)(D), 127 Stat. 672 (2013).

"§856. Art. 56. Sentencing

"(a) SENTENCE MAXIMUMS.—The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

"(b) SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—(1) Except as provided in subsection (d) of section 853a of this title (article 53a), punishment for any offense specified in paragraph (2) shall include dismissal or dishonorable discharge, as applicable.

"(2) The offenses referred to in paragraph (1) are as follows:

"(A) Rape under subsection (a) of section 920 of this title (article 120).

"(B) Sexual assault under subsection (b) of such section (article).

"(C) Rape of a child under subsection (a) of section 920b of this title (article 120b).

"(D) Sexual assault of a child under subsection (b) of such section (article).

"(E) An attempt to commit an offense specified in subparagraph (A), (B), (C), or (D) that is punishable under section 880 of this title (article 80).

"(c) IMPOSITION OF SENTENCE.—

"(1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

"(A) the nature and circumstances of the offense and the history and characteristics of the accused;

"(B) the impact of the offense on—

"(i) the financial, social, psychological, or medical well-being of any victim of the offense; and

"(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

"(C) the need for the sentence—

"(i) to reflect the seriousness of the offense;

"(ii) to promote respect for the law;

"(iii) to provide just punishment for the offense;

"(iv) to promote adequate deterrence of misconduct;

"(v) to protect others from further crimes by the accused;

"(vi) to rehabilitate the accused; and

"(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

"(D) the sentences available under this chapter; and

"(E) the applicable sentencing parameters or sentencing criteria prescribed under this section.

"(2) APPLICATION OF SENTENCING PARAMETERS IN GENERAL AND SPECIAL COURTS-MARTIAL.—

"(A) Except as provided in subparagraph (B), in a general or special court-martial in which the accused is convicted of an offense with a sentencing parameter under subsection (d), the military judge shall sentence the accused for that offense within the applicable parameter.

"(B) The military judge may impose a sentence outside a sentencing parameter upon finding specific facts that warrant such a sentence. The military judge shall include in the record a written statement of the factual basis for any sentence under this subparagraph.

"(3) USE OF SENTENCING CRITERIA IN GENERAL AND SPECIAL COURTS-MARTIAL.—In a general or special court-martial in which the accused is convicted of an offense with sentencing criteria under subsection (d), the military judge shall consider the applicable sentencing criteria in determining the sentence for that offense.

"(4) OFFENSE BASED SENTENCING IN GENERAL AND SPECIAL COURTS-MARTIAL.—In announcing the sentence under section 853 of this title (article 53) in a general or special court-martial, the military judge shall, with respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any. If the accused is sentenced to confinement for more than

one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.

"(5) NONAPPLICABILITY TO DEATH PENALTY.—Sentencing parameters and sentencing criteria are not applicable to the issue of whether an offense should be punished by death.

"(6) SENTENCE OF CONFINEMENT FOR LIFE WITHOUT ELIGIBILITY FOR PAROLE.—(A) If an offense is subject to a sentence of confinement for life, a court-martial may impose a sentence of confinement for life without eligibility for parole.

"(B) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—

"(i) the sentence is set aside or otherwise modified as a result of—

"(I) action taken by the convening authority or the Secretary concerned; or

"(II) any other action taken during post-trial procedure and review under any other provision of subchapter IX of this chapter;

"(ii) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

"(iii) the accused is pardoned.

"(d) ESTABLISHMENT OF SENTENCING PARAMETERS AND SENTENCING CRITERIA.—

"(1) IN GENERAL.—The President shall prescribe regulations establishing sentencing parameters and sentencing criteria in accordance with this subsection.

"(2) SENTENCING PARAMETERS.—(A) A sentencing parameter provides a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—

"(i) the severity of the offense;

"(ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court;

"(iii) any military-specific sentencing factors; and

"(iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused.

"(B) Sentencing parameters established under paragraph (1)—

"(i) shall include no fewer than seven and no more than twelve offense categories;

"(ii) other than for offenses identified under paragraph (5)(B), shall assign each offense under this chapter to an offense category;

"(iii) shall delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit; and

"(iv) shall be neutral as to the race, sex, national origin, creed, sexual orientation, and socioeconomic status of offenders.

"(3) SENTENCING CRITERIA.—Sentencing criteria are factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.

"(4) MILITARY SENTENCING PARAMETERS AND CRITERIA BOARD.—

"(A) IN GENERAL.—There is established within the Department of Defense a board, to be known as the 'Military Sentencing Parameters and Criteria Board', hereinafter referred to in this subsection as the 'Board'.

"(B) VOTING MEMBERS.—The Board shall have five voting members, as follows:

"(i) The four chief trial judges designated under section 826(g) of this title (article 26(g)), except that, if the chief trial judge of the Coast Guard is not available, the Judge Advocate General of the Coast Guard may designate as a voting member a judge advocate of the Coast Guard with substantial military justice experience.

"(ii) A trial judge of the Navy, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Navy.

"(iii) A trial judge of the Marine Corps, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Marine Corps.

"(C) NONVOTING MEMBERS.—The Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the

General Counsel of the Department of Defense shall each designate one nonvoting member of the Board.

"(D) CHAIR AND VICE-CHAIR.—The Secretary of Defense shall designate one voting member as chair of the Board and one voting member as vice-chair.

"(5) DUTIES OF BOARD.—

"(A) As directed by the President, the Board shall submit to the President for approval—

"(i) sentencing parameters for all offenses under this chapter, other than offenses that are identified by the Board as unsuitable for sentencing parameters; and

"(ii) sentencing criteria to be used by military judges in determining appropriate sentences for offenses that are identified as unsuitable for sentencing parameters.

"(B) For purposes of this paragraph, an offense is unsuitable for sentencing parameters if—

"(i) the nature of the offense is indeterminate and unsuitable for categorization; and

"(ii) there is no similar criminal offense under the laws of the United States or the laws of the District of Columbia.

"(C) The Board shall consider the appropriateness of sentencing parameters for punitive discharges, fines, reductions, forfeitures, and other punishments authorized under this chapter.

"(D) The Board shall regularly review, and propose revision to, in consideration of comments and data coming to its attention, the sentencing parameters and sentencing criteria prescribed under subsection (d)(1).

"(E) The Board shall develop means of measuring the degree to which applicable sentencing, penal, and correctional practices are effective with respect to the sentencing factors and policies set forth in this section.

"(F) In fulfilling its duties and in exercising its powers, the Board shall consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system. The Board shall establish separate advisory groups consisting of individuals with current or recent experience in command and in senior enlisted positions, individuals with experience in the trial of courts-martial, and such other groups as the Board deems appropriate.

"(G) The Board shall submit to the President proposed amendments to the rules for courts-martial with respect to sentencing proceedings and maximum punishments, together with statements explaining the basis for the proposed amendments.

"(H) The Board shall submit to the President proposed amendments to the sentencing parameters and sentencing criteria, together with statements explaining the basis for the proposed amendments.

"(I) The Board may issue nonbinding policy statements to achieve the Board's purposes and to guide military judges in fashioning appropriate sentences,

including guidance on factors that may be relevant in determining where in a sentencing parameter a specification may fall, or whether a deviation outside of the sentencing range may be warranted.

"(J) The Federal Advisory Committee Act shall not apply with respect to the Board or any advisory group established by the Board.

"(6) VOTING REQUIREMENT.—An affirmative vote of at least three members is required for any action of the Board under this subsection.

"(e) APPEAL OF SENTENCE BY THE UNITED STATES.—(1) With the approval of the Judge Advocate General concerned, the Government may appeal a sentence to the Court of Criminal Appeals, on the grounds that—

"(A) the sentence violates the law;

"(B) in the case of a sentence for an offense with a sentencing parameter under this section, the sentence is a result of an incorrect application of the parameter; or

"(C) the sentence is plainly unreasonable.

"(2) An appeal under this subsection must be filed within 60 days after the date on which the judgment of a court-martial is entered into the record under section 860c of this title (article 60c).

"(3) The Government may appeal a sentence under this section only after sentencing parameters are first prescribed under subsection (f).".

(b) CONFORMING AMENDMENT.—Section 856a of title 10, United States Code (article 56a of the Uniform Code of Military Justice), is repealed.

(c) IMPLEMENTATION OF SENTENCING PARAMETERS AND CRITERIA.—(1) Not later than four years after the date of the enactment of this Act, the President shall prescribe the regulations for sentencing parameters and criteria required by subsection (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice).

(2) Not later than one year after the date of the enactment of this Act, the President shall prescribe interim guidance for use in sentencing at courts-martial before the implementation of sentencing parameters and criteria pursuant to the regulations referred to in paragraph (1). Insofar as the President considers practicable, the interim guidance shall be consistent with the purposes and procedures set forth in subsections (c) and (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), taking into account the interim nature of the guidance. For purposes of sentencing under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the interim guidance shall be treated as sentencing parameters and criteria.

(3) The President shall prescribe the effective dates of the regulations referred to in paragraph (1) and of the interim guidance referred to in paragraph (2).

(d) PROSPECTIVE REPEAL OF SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—Upon the taking effect of sentencing parameters for offenses specified in paragraph (2) of subsection (b) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as in effect on the day after the date of the enactment of this Act—

(1) section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended—

(A) in subsection (a), by striking "(a) SENTENCE MAXIMUMS.—"; and

(B) by striking subsection (b); and

(2) section 853a of title 10, United States Code (article 53a of the Uniform Code of Military Justice), is amended by striking subsections (c) and (d) and inserting the following new subsection:

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties; or

"(2) contains a provision that is not understood by the accused.".

9. Sectional Analysis

Section 801 would amend Article 56, which provides the authority for the President to set maximum punishments for UCMJ violations, subject to any maximum or mandatory punishments Congress has established in the UCMJ. The President has exercised this authority in two ways: (1) by limiting the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003; and (2) by limiting the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed at a court-martial.

The proposed amendments would align court-martial sentencing procedures with the proposal for judicial sentencing in all non-capital general and special courts-martial. *See* Section 716, *supra.* The amendments are designed to be phased in over a four-year period to enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system. The amendments also would increase the transparency of military sentencing practices and provide additional structure in sentencing, while retaining flexibility in determining an appropriate sentence for the individual.

The amendments proposed in Section 801 would take effect in two phases, as follows:

Phase One. The first phase would begin on the date the legislation is enacted. During the first phase, the Military Sentencing Parameters and Criteria Board (the Board) would begin the process of gathering sentencing data for the development of sentencing parameters and criteria. During this Phase, the President would establish interim guidance, to become effective upon the effective date of the legislation. The Board would be primarily responsible for developing the interim guidance. In this phase, judicial sentencing in all non-capital general and special courts-martial would take effect. *See* Section 716, *supra*. Under judicial sentencing, the current adversarial sentencing process (which utilizes many of the procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. The sentencing process during the first phase also would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without any explanation as to how the sentence was reached or which portions of the sentence are attributable to which offense.

In the first phase, which would be completed within four years after the legislation is enacted, the Board also would develop sentencing parameters and criteria to replace the interim guidance. The sentencing parameters and criteria proposed by the Board would be subject to approval by the President. As in many civilian courts, a sentencing parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board also would establish sentencing criteria—factors that a judge must consider when sentencing a case, but that do not propose a specific punishment. The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance. Until the parameters and criteria are implemented, the sentencing process would utilize the procedures set forth in Phase One.

Phase Two. In the second phase, which would begin four years after the legislation is enacted, the parameters and criteria approved by the President would apply to sentencing proceedings for general and special courts-martial. Military judges would utilize the parameters and criteria in conjunction with the segmented sentencing procedures and other changes in the sentencing process developed during Phase One. Military judges would retain discretion to sentence outside parameters in order to fashion individualized sentences, subject to a requirement to set forth on the record reasons for any departure.

Finally, once sentencing parameters are in place, this proposal would authorize government appeals of sentences and eliminate the requirement for mandatory minimum discharges. By addressing sentencing discretion through the use of parameters, Article 56 would reduce the need for rigid mandatory minimum sentences.

Section 801(a) would amend Article 56 in its entirety. As amended, Article 56 would contain the following provisions:

Article 56(a)-(b) would retain current law regarding maximum and minimum sentences, subject to Section 801(d), *infra.*

Article 56(c)(1) would enumerate factors the court-martial would be required to consider before imposing a sentence. The proposed factors are adapted from 18 U.S.C. § 3553(a).

Article 56(c)(2) would require the military judge to determine a sentence in accordance with the sentencing parameters established by the President. Consistent with federal civilian practice, a military judge could sentence outside the parameter based upon written factual findings that such a sentence is justified. This paragraph would not apply to summary courts-martial.

Article 56(c)(3) would require the military judge to consider sentencing criteria established by the President when determining a sentence. The sentencing criteria would provide factors for the military judge to consider, and would not direct any specific punishment. This paragraph would not apply to summary courts-martial.

Article 56(c)(4) would require the military judge to determine the appropriate amount of fine and confinement for each separate offense of which the accused is found guilty. The assignment of a specific sentence for each offense is designed to provide additional transparency to the parties and the public and advance the purposes of sentencing. With respect to all other punishments (discharges, reductions, forfeitures, and similar unique military punishments), the current practice of awarding a single sentence for all offenses would be retained, as these punishments are not readily segmented. To ensure the accused is not punished twice for what is substantially one offense, the military judge would be required to determine whether periods of confinement should run concurrently or consecutively. The requirement to determine whether sentences should run concurrently or consecutively is in the statute, and the process for making the determination is left to the Rules for Courts-Martial. A sentence to confinement for one offense that runs concurrently with the sentence to confinement of another offense would not increase the total period of

confinement for purposes of determining whether the period of confinement satisfies a jurisdictional predicate (i.e., confinement for more than six months) for an appeal as of right to the Court of Criminal Appeals under proposed revisions to Article 66(b)(1)(A). In general, this subsection envisions requiring military judges to impose concurrent sentences when the offenses involve the same act, transaction, or criminal objective and the same victim. This would be similar to the rules governing the grouping of offenses under § 3D1.2(a-b) of the United States Sentencing Commission Guidelines Manual. In other circumstances, the decision to have sentences run concurrently would be left to the discretion of the judge, informed by consideration of the purposes of sentencing. This paragraph would not apply to summary courts-martial.

Article 56(c)(5) would provide that sentencing parameters and criteria do not apply to the issue of whether an offense should be punished by death.

Article 56(c)(6) would incorporate Article 56a (Sentence of confinement for life without eligibility for parole) into Article 56 without substantive change. Article 56a would be repealed. *See* Section 801(b), *infra.*

Article 56(d)(1) would require the President to establish sentencing parameters and criteria.

Article 56(d)(2) would establish the requirements for sentencing parameters. Except for unique military offenses, all violations of the UCMJ would be assigned to between seven and twelve offense categories. Each offense category would specify a range of confinement and may include an appropriate range for other punishments such as discharges. The subsection also would prescribe the minimum requirements for each sentencing parameter.

Article 56(d)(3) defines sentencing criteria as factors that the military judge must consider when sentencing. Under the proposal, there are two types of sentencing criteria: criteria that inform how to punish a violation of a specific offense (e.g., factors that aggravate or mitigate the harm of a military offense); and criteria that inform when certain punishments may be appropriate or inappropriate (e.g., factors that inform when a reduction or discharge may be appropriate).

Article 56(d)(4) would create the Military Sentencing Parameters and Criteria Board to develop parameters and criteria. The Board would be created within the Department of Defense, and would be composed of the chief trial judge of each service, subject to the opportunity to detail alternate members when required by circumstances applicable to the Navy, Marine Corps, and Coast Guard. The chief trial judges would be detailed by the Judge Advocate General of each military Service and the Secretary of Defense would select a chair and vice-chair of the Board. Service on the Board would be a collateral duty. The Board would have non-voting members designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the

General Counsel of the Department of Defense. The Department of Defense would provide full-time staff to assist the Board.

Article 56(d)(5) would prescribe the duties of the Board. The Board would be required to develop sentencing parameters, criteria, and sentencing rules for submission to the President. The Board also could promulgate non-binding policies on sentencing. In fulfilling its duties, the Board would be required to consult with commanders, enlisted leaders, practitioners, and others. The Board would be required to establish two advisory groups. The first advisory group would be composed of senior officer and enlisted members who provide guidance on the effectiveness of military justice on discipline. The second advisory group would be composed of military justice practitioners.

Article 56(e) would provide for limited appeal of sentences by the government. This right would be available only after the establishment of sentencing parameters. Similar to 18 U.S.C. § 3742(b)(4), the government would be required to obtain the approval of the Judge Advocate General before filing an appeal on the sentence. Finally, such appeals would be limited to whether the sentence is illegal, calculated incorrectly, or is plainly unreasonable. In determining whether a sentence is plainly unreasonable, a Court of Criminal Appeals could, but would not be required to, presume that a sentence within a sentencing parameter is reasonable. The core of the subsection is taken from 18 U.S.C. § 3742, modified for military practice and reflecting the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

Section 801(b) is a conforming amendment.

Section 801(c) would require the President to prescribe the regulations for sentencing parameters and criteria required by Article 56(d), as amended, not later than four years after enactment of the bill. It also would require the President to prescribe interim guidance.

Section 801(d) would repeal Article 56(b) and Article 53a(d) upon the taking effect of sentencing parameters for the offenses specified in Article 56(b)(2) that have mandatory minimum punishments. *See also* Section 717, *supra.*

Articles 57, 57a, and 71 – Effective Date of Sentences; Deferment of Sentences; & Execution of Sentence; Suspension of Sentence

10 U.S.C. §§ 857-57a, 871

1. Summary of Proposal

This proposal would consolidate Articles 57, 57a, and 71 into Article 57 (Effective Date of Sentences). The proposal would address in a single article the effective date for all punishments that could be adjudged at a court-martial. This proposal also would make conforming changes to reflect the proposed changes to Article 60 (Action of Convening Authority), Article 66 (Review by Court of Criminal Appeals), Article 69 (Review in the office of the Judge Advocate General), and the proposed Article 60c (Entry of Judgment).

2. Summary of the Current Statutes

Articles 57, 57a, and 71 address related aspects of court-martial sentences, as follows:

- Article 57 (Effective date of sentences): Article 57 establishes when punishments adjudged by a court-martial become effective. Article 57(a) provides that a sentence to forfeitures or a reduction in pay-grade becomes effective either fourteen days after the sentence is adjudged, or when the convening authority approves the sentence, whichever is earlier. The convening authority may defer the effective date of a sentence of forfeitures or reduction until the convening authority approves the sentence under Article 60. A deferral may be rescinded at any time. Under Article 57(b), a sentence to confinement begins to run on the day the sentence is adjudged, excluding periods when the confinement is deferred or suspended. Subsection (c) provides that all other punishments become effective when ordered executed by the convening authority or other authorized person.

- Article 57a (Deferment of sentences): Article 57a authorizes the convening authority to defer a sentence to confinement for any of three conditions. First, under subsection (a), at the request of the accused, the convening authority may defer the service of confinement until the convening authority orders the sentence executed. Second, under subsection (b), a convening authority may defer a sentence to confinement without the consent of the accused, in limited circumstances when the accused is in the custody of a state or territory of the United States or a foreign government. Finally, under subsection (c), the Service Secretary may defer a sentence to confinement when the Judge Advocate General has certified the case for review to the U.S. Court of Appeals for the Armed Forces under Article 67(a)(2).

- Article 71 (Execution of sentences; suspension of sentence): Article 71 authorizes and limits the convening authority's ability to order a sentence executed. Article 71(a) requires that a sentence of death must be approved by the President. Subsection (b) requires that a

dismissal of an officer, cadet, or midshipman must be approved by the Service Secretary (with limited delegation authority). Subsection (c) requires that, in addition to the requirements of subsections (a)-(b), the part of a sentence that includes death or a punitive discharge may be executed only after a final judgment on the legality of the proceedings (i.e. completion of appellate review). Article 71(c)(2) provides that all other punishments included in a sentence may be ordered executed when the convening authority approves the sentence under Article 60. Article 71(d) authorizes the convening authority to suspend any sentence except for a death sentence. By reference to Article 60, the authority to suspend a sentence or any part thereof is limited to: (1) offenses that have a maximum punishment of two years or less, and when the sentence did not include a punitive discharge or confinement for more than six months; (2) pretrial agreements; and (3) instances when the accused has provided substantial assistance in the investigation or prosecution of another case.

3. Historical Background

Under the Articles of War, court-martial sentences did not become effective until they were approved and ordered executed by the convening authority.[1] When the UCMJ was enacted in 1950, Article 57 provided that confinement could begin to run on the day the sentence was adjudged.[2] Article 57a (Deferment of sentences) was added to the Code in 1968.[3] In 1996, Congress passed several reforms aimed at stopping convicted servicemembers from receiving most pay and allowances while confined.[4] Included in the reforms was an amendment to Article 57 providing that a sentence of forfeiture of pay or reduction in rank would take effect no later than fourteen days after the sentence was adjudged.[5] Article 71 prohibits executing a discharge until after the completion of appellate review and has remained relatively unchanged since the UCMJ's enactment in 1950.[6]

4. Contemporary Practice

The President has implemented Articles 57, 57a, and 71 through R.C.M. 1108 (Suspension of execution of sentence; remission) and R.C.M. 1113 (Execution of sentences). Under current law and practice, a sentence to confinement takes effect on the day the sentence is announced. A sentence that includes reduction in pay grade or forfeitures takes effect when

[1] *See* AW 46 of 1917 ("No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court . . . .").

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[4] NDAA FY 1997, Pub. L. No. 104-201, § 1068, 110 Stat. 2655 (1996) (amending Article 58b to limit the circumstances in which a confined accused could continue to receive pay and allowances); 10 U.S.C. § 12740 (requiring that an accused sentenced to a punitive discharge would lose entitlement to retired pay).

[5] NDAA FY 1996, Pub. L. No. 104-106, tit. XI, 110 Stat. 461-67.

[6] *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (redefining when appellate review is complete to account for the limited Supreme Court review added in 1983).

the sentence is approved, or fourteen days after the sentence is announced, whichever is earlier. The convening authority may defer confinement and forfeitures and reduction until the convening authority approves the sentence and orders it executed. When approving the sentence, consistent with Article 71, the convening authority will normally order the sentence executed except for the part of the sentence that includes a punitive discharge or death. Typically, a sentence that includes a fine, restriction, reprimand, or hard labor takes effect when the convening authority approves the sentence and orders it executed.

For capital cases, the President must approve the sentence; this includes the authority to commute or suspend any part of the sentence other than death. In cases involving the dismissal of an officer, cadet, or midshipman, the Service Secretary (or designated deputy or assistant secretary) must approve the dismissal; this includes the authority to commute or set aside any part of the sentence.

In addition to the requirement for approval by the President or Service Secretary, a sentence that includes a punitive discharge or death may not be executed until a final judgment as to the legality of the proceedings is complete (i.e. the completion of appellate review). Appellate review is complete when the appeal is waived under Article 61, or when the Court of Criminal Appeals has reviewed the case and any petition to a higher court for review has been addressed, or the time to petition higher courts has expired. After the completion of appellate review (and approval by the President or the Secretary concerned, if required), the convening authority may order the remaining part of the sentence executed. In practice, the services have generally designated a single convening authority to address the execution of discharges.

5. Relationship to Federal Civilian Practice

In federal civilian practice, the district court judge enters the judgment and the sentence is executed in accordance with the court's judgment or order.[7] A sentence of death is stayed automatically if the defendant files an appeal.[8] For other punishments, a district court judge has broad discretion to stay a sentence.

6. Recommendations and Justification

Recommendation 57.1: Combine the relevant portions of Article 57 and 57a that govern deferment of sentence into a single subsection within Article 57 ("Deferment").

As a conforming change to the proposal for an entry of judgment under Article 60c, the deferment of a sentence would terminate at entry of judgment instead of action by the convening authority under Article 60. No substantive change in the convening authority's ability to defer, rescind a deferral, or other change is proposed.

[7] FED. R. CRIM. P. 32(k)(1) (Judgment).

[8] FED. R. CRIM. P. 38 (Staying a Sentence or a Disability).

Recommendation 57.2: Combine the relevant provisions of Articles 57 and 71 that govern when sentences become effective into a single subsection within Article 57 ("Effective date of sentences").

The proposed new subsection would continue current practices for when a sentence becomes effective (e.g. immediately for confinement, upon completion of appellate review for discharges). As a conforming change to the proposal for an entry of judgment under Article 60c, the requirement that a sentence be ordered executed would be removed.

Also, in order to conform with the proposed changes to Article 60c, punishments that currently become effective when the convening authority takes action under Article 60 would become effective upon entry of judgment. Under this proposal, all punishments (other than punitive discharges and death sentences) would be effective upon entry of judgment by operation of law. Discharges would be issued after the completion of appellate review in accordance with service regulations, but would not require action by a convening authority ordering the discharge executed. No change is proposed to the requirement for presidential and secretarial approval for death and dismissals, respectively.

This proposal would allow all parties to more clearly understand when sentences become effective and reduce the possibility of error. For example, under current law, a convening authority may defer confinement, forfeitures and reduction. However, the authority for deferment is contained in two different articles,[9] which have slightly different definitions of when a deferment ends,[10] and differ on which "convening authority" is authorized to defer the sentence.[11]

Recommendation 57.3: Remove from Article 71 the authority for a convening authority to suspend a sentence under Article 71(d).

This is a conforming change to the proposal for Article 60a, which addresses suspension authority.

Recommendation 57.4: Delete Articles 57a and 71.

As described above, the authorities contained in Articles 57a and 71 will be placed within Article 57.

[9] *Compare* Article 57(a)(2) (deferment of reduction and forfeitures) *with* Article 57a(a) (deferment of confinement).

[10] *Compare* Article 57(a)(2) (deferment ends when the sentence is "approved") *with* Article 57a(a) (deferment ends when the sentence "is ordered executed").

[11] *Compare* Article 57(a)(4) (convening authority is the person authorized to act under Article 60) *with* Article 57a(a) (convening authority or, if the accused is no longer under his jurisdiction, the officer currently exercising general court-martial jurisdiction over the accused).

7. Relationship to Objectives and Related Provisions

This proposal incorporates several conforming changes related to proposed changes to the post-trial and appellate process. Under the proposal for Article 60c, an "entry of judgment" would serve as a substitute for the convening authority's "action" in stating the results of the court-martial. For purposes of determining when a discharge can be effectuated, the proposed revision of review procedures under Article 66 (Review by Court of Criminal Appeals) and Article 69 (Review in the office of the Judge Advocate General) require conforming changes.

This proposal supports MJRG Operational Guidance by addressing ambiguities in related statutory authorities that are currently spread across three different UCMJ articles.

8. Legislative Proposal

SEC. 802. EFFECTIVE DATE OF SENTENCES.

(a) IN GENERAL.—Section 857 of title 10, United States Code (article 57 of the Uniform Code of Military Justice), is amended to read as follows:

"§857. Art. 57. Effective date of sentences

"(a) EXECUTION OF SENTENCES.—A court-martial sentence shall be executed and take effect as follows:

"(1) FORFEITURE AND REDUCTION.—A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect. Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

"(A) the date that is 14 days after the date on which the sentence is adjudged; or

"(B) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

"(2) CONFINEMENT.—Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

"(3) APPROVAL OF SENTENCE OF DEATH.—If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as the President sees fit. That part of the sentence providing for death may not be suspended.

"(4) APPROVAL OF DISMISSAL.—If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of

the sentence, as the Secretary sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

"(5) COMPLETION OF APPELLATE REVIEW.—If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge, that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may be executed, in accordance with service regulations, after completion of appellate review (and, with respect to death or dismissal, approval under paragraph (3) or (4), as appropriate).

"(6) OTHER SENTENCES.—Except as otherwise provided in this subsection, a general or special court-martial sentence is effective upon entry of judgment and a summary court-martial sentence is effective when the convening authority acts on the sentence.

"(b) DEFERRAL OF SENTENCES.—(1) On application by an accused, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may, in his or her sole discretion, defer the effective date of a sentence of confinement, reduction, or forfeiture. The deferment shall terminate upon entry of judgment or, in the case of a summary court-martial, when

the convening authority acts on the sentence. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

"(2) In any case in which a court-martial sentences a person referred to in paragraph (3) to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a State or foreign country referred to in that paragraph.

"(3) Paragraph (2) applies to a person subject to this chapter who—

"(A) while in the custody of a State or foreign country is temporarily returned by that State or foreign country to the armed forces for trial by court-martial; and

"(B) after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

"(4) In this subsection, the term 'State' includes the District of Columbia and any Commonwealth, territory, or possession of the United States.

"(5) In any case in which a court-martial sentences a person to confinement, but in which review of the case under section 867(a)(2) of this title (article

67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

"(c) APPELLATE REVIEW.—(1) Appellate review is complete under this section when—

"(A) a review under section 865 of this title (article 65) is completed; or

"(B) an appeal is filed with a Court of Criminal Appeals or the sentence includes death, and review is completed by a Court of Criminal Appeals and—

"(i) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

"(ii) such a petition is rejected by the Court of Appeals for the Armed Forces; or

"(iii) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

"(I) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

"(II) such a petition is rejected by the Supreme Court; or

"(III) review is otherwise completed in accordance with the judgment of the Supreme Court.

"(2) The completion of appellate review shall constitute a final judgment as to the legality of the proceedings.".

(b) CONFORMING AMENDMENTS.—(1) Subchapter VIII of chapter 47 of title 10, United States Code, is amended by striking section 857a (article 57a of the Uniform Code of Military Justice).

(2) Subchapter IX of chapter 47 of title 10, United States Code, is amended by striking section 871 (article 71 of the Uniform Code of Military Justice).

(3) The second sentence of subsection (a)(1) of section 858b of title 10, United States Code (article 58b of the Uniform Code of Military Justice), is amended by striking "section 857(a) of this title (article 57(a))" and inserting "section 857 of this title (article 57)".

9. Sectional Analysis

Section 802(a) would consolidate Articles 57, 57a, and 71 into Article 57 (Effective date of sentences) to address in a single article the effective date for all punishments that could be adjudged at a court-martial. Article 57, as amended, would contain the following provisions:

Article 57(a) would establish when the punishment adjudged at a court-martial sentence becomes effective. The proposed subsection combines portions of Articles 57, 57a, and 71, and removes the distinction between when a sentence becomes effective and when it is ordered executed. With the exception of death and punitive discharges, sentences would be effective by operation of law without any additional approval upon entry of judgment. This is a conforming change to the proposed changes in Article 60 (Post-trial processing in general and special courts-martial) and the proposed enactment of Articles 60a (Limited authority to act on sentence in specified post-trial circumstances), 60b (Post-trial actions in

summary courts-martial and certain general and special courts-martial), and 60c (Entry of judgment).

Article 57(a)(1) would address when forfeitures and reduction become effective. The first sentence of this paragraph is taken without modification from Article 57(a)(3). The remainder of this paragraph is taken from Article 57(a)(1).

Article 57(a)(2) is taken, without change, from Article 57(b). Article 57(b) would be modified to apply only to summary courts-martial.

Article 57(a)(3) is taken, without change, from Article 71(a).

Article 57(a)(4) is taken, without change, from Article 71(b).

Article 57(a)(5) is taken from Article 71(c)(1) with modification. The provisions of Article 71(c)(1) regarding waiver or withdrawal of an appeal and the definition of what constitutes a final appeal are consolidated in subsection (c).

Article 57(a)(6) is taken from Article 57(c) with modification. As a conforming change to the proposal for Article 60c, in general and special courts-martial "entry of judgment" is substituted for "on the date ordered executed." *See* Section 904, *infra.* For consistency, a summary court-martial sentence would become effective when approved by the convening authority.

Article 57(b)(1) is a combination of Article 57(a)(2), authorizing the deferment of forfeitures and reduction, and Article 57a(a), authorizing the deferment of confinement. The definition of convening authority is taken from Article 57a(a). As a conforming change to the proposal for Article 60c, the deferment of a sentence would terminate upon entry of judgment.

Article 57(b)(2)-(4) are taken from Article 57a(b)(1)-(3), with no substantive changes.

Article 57(b)(5) is taken from Article 57a(c) with conforming changes to reflect the proposed new section, Article 60c (Entry of judgment). *See* Section 904, *infra.*

Article 57(c)(1) is taken from Article 71(c)(1)-(2) with modification to reflect the proposal for an appeal of right. Under the revised language, appellate review would be complete when an Article 65 review is finished, or when the Court of Criminal Appeals has reviewed the case and any petition to a higher court for review has been addressed, or the time to petition higher courts has expired. Paragraph (2) incorporates the current provision in Article 71(c)(1) that the completion of appellate review is a final determination on the legality of the proceedings.

Section 802(b) contains conforming amendments to strike Articles 57a and 71 and an additional conforming amendment to Article 58b.

Article 58 – Execution of Confinement
10 U.S.C. § 858

1. Summary of Proposal

This Report recommends no change to Article 58. Part II of the Report will consider whether changes are needed in the rules implementing Article 58.

2. Summary of the Current Statute

Article 58 concerns the execution of confinement of members who have been found guilty and sentenced to confinement. Article 58 is a permissive article, allowing a sentence of confinement to be executed in any military confinement facility, any penal or correctional facility of the United States, or in any facility that the United States is allowed to use. Under the statute, the Service Secretaries are authorized to provide additional instructions on the execution of confinement. Article 58 specifies that an accused's military status does not relieve him or her from the same discipline as other persons confined in the same institution. Under Article 58(b), "[t]he omission of the words 'hard labor' from any sentence of a court-martial adjudging confinement does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment."

3. Historical Background

Congress enacted Article 58 as part of the original UCMJ in 1950.[1] The article was derived from Articles 37 and 42 of the Articles of War, and Article 7 of the Articles for the Government of the Navy, which allowed flexibility in the places of confinement for an accused in order to maximize rehabilitative potential.[2]

4. Contemporary Practice

Under current practice, if a military confinement facility is not available, the Department of Defense specifically allows for military prisoners to be confined in civilian facilities used by the U.S. Marshals Service. If a facility used by the U.S. Marshals Service is not available, then a facility accredited by the American Correctional Association or by the State in which the prisoner is to be confined may be used.[3]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1093-94 (1949). Although Congress has twice amended the article, the changes were minor and did not alter the article's substance. Act of Aug. 10, 1956, Pub. L. No. 84-0128, 80A Stat. 1; NDAA FY 2006, Pub. L. No. 109-163, § 1057(a)(3), 119 Stat. 3136.

[3] DEP'T OF DEF. INSTR. 1325.07, March 11, 2013. This DoD instruction is applicable also to the Coast Guard at all times, including, by agreement, when it is a Service of the Department of Homeland Security.

In 2005, the Defense Base Closure and Realignment Commission (BRAC) recommended the reduction and realignment of a number of military confinement facilities to create five Joint Regional Correctional Facilities.[4] The closure of many local facilities created a logistical difficulty on bases located long distances from any of the regional confinement facilities. As a result, most services contract with civilian confinement facilities when there is not a nearby military facility.[5]

5. Relationship to Federal Civilian Practice

The Attorney General controls and manages. Federal penal and correctional institutions outside of military and naval institutions.[6] For the purpose of providing suitable quarters for the safekeeping, care and subsistence of prisoners, the Attorney General can contract with the proper authorities of any State, Territory, or political subdivision for the imprisonment, subsistence, care, and proper employment of prisoners.[7] If there are no suitable or sufficient facilities available in a State, Territory, or political subdivision, the Attorney General can order the creation of a new place of confinement.[8]

6. Recommendation and Justification

Recommendation 58: No change to Article 58.

In view of the well-developed case law addressing Article 58's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[4] *See* DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION REPORT 208-209 (2005). The Southwest Joint Regional Correctional Facility consolidated the Naval Consolidated Brig Miramar, the Edwards Confinement Facility, the Kirtland Confinement Facility, and the Marine Corps Base Brig, Camp Pendleton. The Midwestern Joint Regional Correctional Facility consolidated the Lackland Confinement Facility, the Army Regional Correctional Facility, and the components of the US Disciplinary Barracks at Fort Leavenworth, Kansas. The Southeastern Joint Regional Correctional Facility consolidated the Naval Consolidated Brig Charleston, and the Waterfront Brig Jacksonville. The Mid-Atlantic Joint Regional Correctional Facility consolidated the Naval Brig Norfolk, Marine Corps Base Brig, Quantico, VA, and Marine Corps Base Brig Camp LeJeune, NC. The Northwestern Joint Regional Correctional Facility consolidated the Army Regional Correctional Facility at Fort Lewis and the Waterfront Brig Puget Sound.

[5] *See, e.g.*, ARMY REG. 190-47, at 4, 68-69 (5 June 2006).

[6] 18 U.S.C. § 4001.

[7] 18 U.S.C. § 4002.

[8] 18 U.S.C. § 4003.

Article 58a – Sentences: Reduction in Enlisted Grade upon Approval

10 U.S.C. § 858a

1. Summary of Proposal

This proposal would sunset this article when the sentencing parameters and criteria established under the proposal for Article 56 take effect.

2. Summary of the Current Statute

Article 58a provides a mechanism to order a reduction of enlisted members to the grade of E-1 whenever the approved sentence of a court-martial includes a punitive discharge, confinement, or hard labor without confinement, irrespective of whether the adjudged and approved sentence includes a reduction to that grade.

3. Historical Background

Congress enacted Article 58a in 1960, requiring automatic reduction in grade by law unless otherwise provided for in service regulations.[1] The precursor to Article 58a was paragraph 126(e) of the 1951 Manual for Courts Martial, which required that an enlisted member be reduced to the lowest pay grade upon receiving a sentence that included a punitive discharge, confinement, or hard labor without confinement.[2] In 1959, in *United States v. Simpson*, the Court of Military Appeals held that the Manual provision operated improperly to increase the sentence of courts-martial.[3] The Comptroller General disagreed with the court's decision and directed servicemembers to be paid at the reduced grade.[4] To resolve the dispute, Congress enacted Article 58a, which has remained unchanged since its enactment in 1960.[5]

4. Contemporary Practice

The Service Secretaries have taken different approaches in exercising their authority under Article 58a. The Air Force and Coast Guard Secretaries have essentially exempted their services from automatic reduction in pay grade. Regardless of whether a punitive discharge was approved or the length of confinement approved by the convening authority, an

[1] Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468.

[2] MCM 1951, ¶126*e*.

[3] United States v. Simpson, 27 C.M.R. 303 (1959).

[4] Comp. Gen decision, B-139988 (Aug 19, 1959).

[5] Pub. L. No. 86-633, § 1(1), July 12, 1960, 74 Stat. 468.

enlisted member in the Air Force or Coast Guard will be reduced in pay grade only if a reduction was part of the adjudged sentence.[6] Under Army regulations, an accused is reduced to pay grade E-1 whenever the approved sentence includes a punitive discharge or confinement in excess of six months.[7] And in the Navy and Marine Corps, automatic reduction to E-1 is triggered by the convening authority's approval of three months or more confinement or a punitive discharge, but is at the discretion of the convening authority.[8]

5. Relationship to Federal Civilian Practice

A reduction in rank or status based on the sentence awarded at a trial is unique to the military, with no civilian counterpart. The most comparable provision in federal civilian practice is a provision of the U.S. Code that specifies a conviction for certain specified offenses results in forfeiture of civilian retirement pay.[9]

6. Recommendation and Justification

Recommendation 58a: Amend Article 58a by sunsetting the statute after the implementation of the proposed changes to Article 56 punishments.

This proposal is consistent with the accompanying proposals for judge-alone sentencing (Article 53) and the requirement for sentencing parameters and criteria (Article 56). The goal of these related proposals is to improve military sentencing by giving the decision making authority to judges, providing the sentencing judges with objective standards through sentencing parameters and criteria.

Currently, the Army, Navy, and Marine Corps impose automatic reduction to pay grade E-1 based upon two different standards, and the Air Force and the Coast Guard do not impose automatic reduction to pay grade E-1 at all. Eliminating Article 58a would address the substantial discrepancies between the services' different approaches to automatic reductions.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by applying provisions uniformly across the Services to the extent practicable.

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[6] AIR FORCE INSTR. 51-201 (6 Jun 2013); COMMANDANT INSTR. M5810.1E (13 April 2011).

[7] ARMY REG. 27-10 (3 Oct 2011).

[8] JAGINST 5800.7F (26 Jun 2012).

[9] 5 U.S.C. § 8312.

8. Legislative Proposal

SEC. 803. SENTENCE OF REDUCTION IN ENLISTED GRADE.

Section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by striking "as approved by the convening authority" and inserting "as set forth in the judgment of the court-martial entered into the record under section 860c of this title (article 60c)"; and

(B) in the matter after paragraph (3), by striking "of that approval" and inserting "on which the judgment is so entered"; and

(2) in subsection (b), by striking "disapproved, or, as finally approved" and inserting "reduced, or, as finally affirmed".

SEC. 804. REPEAL OF SENTENCE REDUCTION PROVISION WHEN PARAMETERS TAKE EFFECT.

Effective on the effective date of sentencing parameters prescribed by the President under section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as amended by section 801, section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is repealed.

9. Sectional Analysis

Section 803 would amend Article 58a (Sentences: reduction in enlisted grade upon approval), which provides a mechanism for the individual services to order a reduction of enlisted members to the grade of E-1 whenever the approved sentence of a court-martial

includes a punitive discharge, confinement, or hard labor without confinement. The amendments would conform the statute to the changes proposed in post-trial procedure under Article 60 and the proposed Article 60c (Entry of judgment). *See* Section 904, *infra*.

Section 804 would sunset Article 58a after the enactment of sentencing parameters and criteria under Article 56. This sunset provision is consistent with the proposals for judge-alone sentencing under Article 53 and for sentencing parameters and criteria under Article 56. *See* Sections 716 and 801, *supra.* The sentencing parameters and criteria proposed in Section 801 would include objective factors for the military judge to consider in determining whether a sentence should include a reduction in pay grade.

Article 58b – Sentences: Forfeiture of Pay and Allowances During Confinement

10 U.S.C. § 858b

1. Summary of Proposal

This Report recommends no change to Article 58b. Part II of the Report will consider whether any changes are needed in the rules implementing Article 58b.

2. Summary of the Current Statute

Article 58b provides for forfeiture of pay and allowances due during any period of confinement or parole for certain categories of courts-martial sentences. Sentences subject to forfeiture include death, confinement for more than six months, or confinement of six months or less combined with a punitive discharge or dismissal. The extent of the forfeitures differs depending upon the court-martial forum. In general courts-martial, the statute requires all pay and allowances to be forfeited. In special courts-martial, two-thirds of all pay due must be forfeited. If the accused has dependents, the person exercising Article 60 authority may waive any or all of the forfeitures of pay and allowances for up to six months. The money from the waived forfeitures will be paid directly to the dependents. If the sentence of an accused who forfeits pay and allowances is set aside or disapproved, or if the sentence approved does not trigger automatic forfeitures, the accused will receive the previously forfeited money.

3. Historical Background

Article 58b was enacted in 1996 and, with the exception of two minor amendments, has not been changed since then.[1] The statute was a response to Congressional concern that some military servicemembers continued to receive active duty pay and allowances while serving extended prison sentences.[2]

4. Contemporary Practice

Under current law, the Article 60 authority (normally the convening authority) can act on a request for waiver of automatic forfeitures at any time prior to or at the time of action. A request for a waiver is a common term in pretrial agreements for an accused with dependents. Absent a deferment or waiver, automatic forfeitures go into effect fourteen

[1] NDAA FY 1996, Pub. L. No. 104-201, § 1068, 110 Stat. 2655 (1996), *amended by* NDAA FY 1998, Pub. L. No. 105-85, §581-582, 113 Stat. 512 (1999).

[2] H.R. REP. NO. 104-131 (1995).

days after the sentence is adjudged or when the convening authority takes action, whichever occurs first.

5. Relationship to Federal Civilian Practice

Although the concept of forfeiture of property is present in federal civilian practice,[3] the concept of automatic forfeitures as a collateral consequence of an awarded sentence is a predominantly military-specific concept.

6. Recommendation and Justification

Recommendation 58b: No change to Article 58b.

In view of the policy considerations that led to the statutory requirements for forfeiture of pay during specified periods of confinement, and the well-developed case law addressing Article 58b, no statutory change is needed.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[3] *See, e.g.*, FED. R. CRIM. P. 32.2 (Criminal Forfeiture).

Subchapter IX. Post-Trial Procedure and Review of Courts-Martial

Article 59 – Error of Law; Lesser Included Offense
10 U.S.C. § 859

1. Summary of Proposal

This Report recommends no change to Article 59. Part II of the Report will consider whether any changes are needed in the rules implementing Article 59.

2. Summary of the Current Statute

Article 59(a) provides that "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(b) provides that "[a]ny reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense."

3. Historical Background

Article 59(a) was derived from Article 37 of the Articles of War and Section 472 of Navy Courts and Boards, and is intended to preclude reversals "for minor technical errors that do not prejudice the rights of the accused."[1] The committee drafting the original UCMJ noted in particular the statement in Section 472 of the Navy Courts and Boards manual requiring that "[i]f there has been no miscarriage of justice, the finding of the court should not be set aside or a new trial granted because of technical errors or defects which do not affect the substantial rights of the accused." Article 59(b) was derived from Articles 47 and 49 of the Articles of War and Article 39 of the proposed Articles for the Government of the Navy.[2] The statute has remained unchanged since the UCMJ was enacted in 1950,[3] and the 1951 Manual for Courts-Martial provided guidance incorporating the federal harmless error rule then in effect, based on the Supreme Court's opinion in *Kotteakos v. United States*.[4]

In addition to harmless error review, military appellate courts embrace the concept of plain error on appeal.[5] The military courts commonly cite to federal law when reviewing for

[1] United States v. Powell, 49 M.J. 460, 462 (C.A.A.F. 1998) (citing *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the House Armed Services Comm.*, 81st Cong., 1st Sess. 1174-75 (1949)).

[2] UNIFORM CODE OF MILITARY JUSTICE, TEXT REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE CODE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE (1949) (The "Morgan" draft).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] 328 U.S. 750 (1946); *see also* Captain Murl A. Larkin, JAGC, USN, *When Is an Error Harmless?* 22 JAG JOURNAL 65 (1968).

[5] The concept that an appellate court can review legal error that was not raised at trial dates back to the nineteenth century. *See* Jeffrey L. Lowry, *Plain Error Rule — Clarifying Plain Error Analysis under Rule 52(b) of*

plain error, while acknowledging the constraints of Article 59(a).[6] For example, in 1951, the Court of Military Appeals looked to the federal plain-error rule in assessing a trial error asserted for the first time on appeal:

> We adopt and follow the rule announced by the federal courts in those cases where error is asserted for the first time on appeal. . . . The admitted normal rule is that an appellate court will not consider matters which are alleged as error for the first time on appeal. . . . However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'[7]

In 1998, in *United States v. Powell*, the Court of Appeals for the Armed Forces explained that, although Courts of Criminal Appeals may notice otherwise forfeited errors, they are constrained by Article 59(a), because they may not reverse for legal error unless the error "materially prejudices the substantial rights of the accused."[8]

4. Contemporary Practice

Military appellate courts test errors under both "harmless error" and "plain error" standards of review, depending on whether the error was raised at trial or noticed for the first time on appeal. The standard for demonstrating harmlessness may vary, depending on whether the type of error being assessed is a constitutional error or a non-constitutional error.[9] These standards of review largely track with federal appellate standards of review, with some variation due to the language of Article 59(a) and the unique appellate authority of the military Courts of Criminal Appeals under Article 66(c). Article 59(a) limits the appellate court's authority to reverse a finding or sentence for an error of law unless the

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the Federal Rules of Criminal Procedure, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1066 (1994) (citing FED. R. CRIM. P. 52(b) advisory committee's note). As early as 1896, the Supreme Court recognized that "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it, even though the defendants in the case had not 'duly excepted' to the error at trial." Wilborg v. United States, 163 U.S. 632, 658 (1896). Forty years later, the Court reaffirmed that, "in exceptional circumstances, especially in criminal cases, appellate courts . . . may . . . notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Atkinson, 297 U.S. 157, 160 (1936). Eventually, the federal common law on plain error was codified in FED. R. CRIM. P. 52(b).

[6] *Powell*, 49 M.J. at 464.

[7] *Id.* (citing *Atkinson*, 297 U.S. at 160); *see also* United States v. Stephen, 35 C.M.R. 286, 289 (C.M.A. 1965) (finding that the appellate courts, in exceptional circumstances, may "notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of the judicial proceedings"); United States v. Stringer, 16 C.M.R. 68, 72-3 (C.M.A. 1954) (applying *Atkinson* plain error test to consider whether the error, alleged for the first time on appeal, would "seriously affect the fairness, integrity, or public reputation of judicial proceedings.").

[8] 49 M.J. at 464.

[9] United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007); *see also* Major Terri J. Erisman, *Defining the Obvious: Addressing the Use and Scope of Plain Error,* 61 A.F. L. REV. 41, 45 (2008).

error "materially prejudices the substantial rights of the accused."[10] Accordingly, when conducting plain error review, military appellate courts have articulated a three-part test. An appellant has the burden of demonstrating: (1) that there is error; (2) that the error is plain or obvious; and (3) that the error materially prejudiced a substantial right of the accused."[11]

The President has implemented Article 59, in part, through M.R.E. 103(a).[12] This rule provides that error may not be predicated upon a ruling which admits or excludes evidence unless the ruling "materially prejudices a substantial right of the party" and a timely objection was made. M.R.E. 103(a) was adapted from the corresponding federal rule of evidence, with the exception that the military rule requires that the ruling "materially prejudices a substantial right," whereas the federal rule requires that the error "affects a substantial right."[13] The formulation of the harmless error language in M.R.E. 103(a) is required by Article 59(a).[14]

5. Relationship to Federal Civilian Practice

The federal standards for harmless error and plain error review are articulated in Fed. R. Crim. P. 52(a) and (b), and are similar to military standards of review under Article 59. Fed. R. Crim. P. 52(a) provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[15] Fed. R. Crim. P. 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." These rules are restatements of the common law. The meanings of "harmless error" and "plain error" are not defined in the rules, but have developed through the case law.

Currently, the federal courts articulate "plain error" slightly differently than in military appellate practice. In federal civilian appellate practice, plain error doctrine allows, but does not require, an appellate court to correct an error not raised at trial only when the appellant demonstrates that: (1) there is error; (2) the error is clear or obvious; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.[16] In *United States v.*

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[10] *Powell*, 49 M.J. at 464.

[11] United States v. Paige, 67 M.J. 442, 449 (C.A.A.F. 2009) (citing United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008)).

[12] *Powell*, 49 M.J. at 462.

[13] FED. R. EVID. 103(a); *see also* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

[14] MCM, App. 22 (M.R.E. 103(a), Analysis).

[15] There is no military counterpart to FED. R. CRIM. P. 52(b) in the Manual. However, the President has promulgated M.R.E. 103(f) based on Rule 52(b).

[16] United States v. Marcus, 560 U.S. 258, 262 (2010).

Dominguez Benitez, the Supreme Court further refined the plain-error test for a guilty-plea case, stating that relief for Rule 11 error must be tied to prejudicial effect.[17] Under the test, in order to demonstrate that an error affected substantial rights, the appellant must show that the error had a prejudicial effect on the outcome of a judicial proceeding. The Court held that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the . . . court committed plain error under Rule 11 . . . must show a reasonable probability that, but for the error, he would not have entered the guilty plea."[18]

6. Recommendation and Justification

Recommendation 59: No change to Article 59.

Litigation in the military justice system concerning review for error takes place in the context of a well-developed and evolving area of law. To the extent that specific aspects of military justice practice need a particular formula for identifying and addressing error, those matters will be addressed in the statutes and rules governing the specific substantive or procedural issues involved. For example, the accompanying proposal to amend Article 45 (Pleas of the accused) would codify harmless error review for guilty pleas. As part of a larger effort to improve the effectiveness of appellate review in the military, that proposal would apply harmless error review to deviations from the requirements of the guilty plea inquiry that were properly preserved at trial. It also would encourage the accused to identify errors in the guilty plea process and bring them to the attention of the trial judge to correct, rather than raise such errors for the first time on appeal and face the more stringent plain error review.

In addition, Part II of the Report will propose two new plain error rules for the Manual for Courts-Martial. It will consider including a broadly-applicable rule for plain error, similar to Fed. R. Crim. P. 52(b), with language appropriate to the military justice system, and will also consider including a new sentence addressing plain error in R.C.M. 910(j), regarding errors in guilty plea inquiries that are not brought to the attention of the trial judge prior to entry of judgment.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to federal criminal trials insofar as practicable in military criminal practice.

Article 59(b) authorizes a reviewing authority to affirm a lesser included offense to a finding of guilty.

[17] United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004).

[18] *Id*. at 83.

Article 60 (Current Law) – Action by the Convening Authority &
Articles 60a, 60b, and 60c (New Provisions)
10 U.S.C. §§ 860-60c

1. Summary of Proposal

This proposal would amend Article 60 (Action by the convening authority), retitling that provision as "Post-trial processing," and would create three new provisions—Article 60a (Limited authority to act on sentence in specified post-trial circumstances); Article 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial); and Article 60c (Entry of judgment). These provisions would align the convening authority's post-trial review responsibilities with current law and with this Report's proposed changes to related statutory provisions. Part II of the Report will address changes in the rules implementing Article 60 and the proposed new statutory provisions in Articles 60a, 60b, and 60c.

2. Summary of the Current Statute

Legislation enacted by Congress in 2013 significantly altered the convening authority's post-trial role under Article 60.[1] Prior to the 2013 legislation, a convening authority possessed virtually unlimited power to disapprove or modify the findings and sentence of a general or special court-martial.

Under the recently revised statute, the convening authority cannot set aside or modify the findings as to any offense unless the offense meets all four of the following criteria: (1) the authorized maximum period of confinement that could have been adjudged in the case must not exceed two years; (2) the sentence adjudged in the case must not include confinement for more than six months; (3) the sentence adjudged in the case must not include a punitive discharge; and (4) the offense must not be a violation of Articles 120(a)-(b), 120b, 125 or any such other offense the Secretary of Defense may specify by regulation. In all other cases, Congress has removed the convening authority's power to disapprove or modify the findings.

In the revised statute, Congress also removed the convening authority's power to disapprove or modify a punitive discharge, or disapprove or modify a sentence to confinement for more than six months, subject to two narrow exceptions: (1) the convening authority still maintains the authority to reduce a sentence pursuant to a pretrial agreement; and (2) upon recommendation by the trial counsel, the convening

[1] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013). The changes to Article 60 went into effect on 24 June 2014.

authority may reduce the sentence of the accused if the accused provided substantial assistance in the investigation or prosecution of another person. As a practical matter, these results have reduced the scope of the convening authority's discretion to acting only on a narrow range of punishments, such as forfeitures, reductions, fines, and confinement for six months or less.

3. Historical Background

Historically, the convening authority's post-trial role in courts-martial has been both executive and quasi-judicial. Prior to the enactment of the UCMJ in 1950, the judgment and sentence of a court-martial was "incomplete and inconclusive, being in the nature of a recommendation only" to the military commander who convened the court-martial.[2] The commander's authority to disapprove or approve in whole or in part the findings and sentence was a matter wholly within the commander's discretion.[3]

Under Article 60 of the UCMJ, as enacted in 1950, the convening authority retained broad authority to modify the findings and sentence so long as the modification did not increase the findings or sentence.[4] The convening authority thus initiated the court-martial (by convening the court and referring charges under Article 34), and terminated it (by taking action on the case under Article 60). In this regard, Article 60 served several important purposes. First, it required prompt reporting to the convening authority of the results of the court-martial to facilitate a timely review. Second, it provided an accused with an opportunity to submit matters for consideration by the convening authority. Third, in many cases it provided for the first-level review by a legal officer (typically the convening authority's staff judge advocate). Fourth, it provided the convening authority with broad discretion to modify the findings or the sentence for legal errors, unjust findings, onerous sentences, or as an act of clemency.[5] Fifth, it required the convening authority to take action on the sentence to effectuate the findings and sentence. Sixth, it empowered the convening authority to order proceedings in revision or rehearings to correct apparent errors or omissions, or improper action by the court-martial with respect to the findings and sentence that could be rectified without material prejudice to accused's substantial rights. Seventh, the convening authority's action terminated the court-martial and transferred the case for appellate review.

4. Contemporary Practice

Under current practice, after the announcement of sentence, the military judge authenticates the record of trial for general and special courts-martial pursuant to R.C.M.

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[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 447 (photo reprint 1920) (2d ed. 1896).

[3] *Id.* at 449.

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] In 1983, Congress removed the requirement for the convening authority to conduct a legal review or otherwise act as an "appellate tribunal," but retained the convening authority's power to modify the findings and sentence as a matter of "command prerogative." S. REP. NO. 98-53, at 7, 19, 21 (1983).

1104. Under this rule, trial counsel serves a copy of the record of trial on the accused, who may submit matters to the convening authority for consideration prior to taking action. In cases involving a victim, the victim may submit matters to the convening authority. The staff judge advocate also must make a recommendation to the convening authority for all general courts-martial and any special court-martial case that includes a punitive discharge or confinement for one year or more. The accused has an opportunity to respond to the staff judge advocate recommendation. As noted above, under the recent amendments to Article 60, the convening authority does not have the power to take any substantive action based upon these submissions except in a limited number of cases involving relatively light sentences. The convening authority's "action" on the court-martial terminates the convening authority's ability to order new trials and proceedings in revision, and transfers jurisdiction of the case to the appellate system, for review under either Article 64 (Review by a judge advocate), Article 69 (Review in the Office of the Judge Advocate General), or Article 66 (Review by Court of Criminal Appeals), depending on the type of court-martial involved and the severity of the sentence.

Although the NDAA FY 2014 amendments substantially reduced the convening authority's power over all but a limited set of cases, the legislation did not revise the comprehensive and time-consuming post-trial process that had been used to inform the discretion previously exercised by the convening authority. As a result, the recent modifications have created some anomalies in the application of Article 60's statutory requirements. For example, the staff judge advocate recommendation is not required under the statute for many cases in which the convening authority's power to act on the qualifying offense was retained; on the other hand, the statute continues to require a staff judge advocate's recommendation in many cases where the convening authority no longer has the power to modify the findings or a sentence of confinement or punitive discharge.[6] Additionally, some cases are now too serious to qualify for discretionary relief from the convening authority under Article 60, but are not serious enough to qualify for automatic appellate review by the Courts of Criminal Appeals.[7]

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[6] In special courts-martial, if the sentence includes a bad-conduct discharge, the staff judge advocate must provide a written recommendation to the convening authority providing advice on the disposition of the case. This written advice is served on the accused, who has an opportunity to respond; the staff judge advocate often then writes an addendum to incorporate issues raised by the accused. However, no written advice is required under Article 60 for special courts-martial that do not involve a bad-conduct discharge. After the recent amendments to Article 60, the convening authority cannot modify the sentence in any case involving a punitive discharge or confinement for more than six months, and can modify the findings in only a limited class of cases constituting relatively minor offenses. Accordingly, in many special courts-martial, written legal advice to the convening authority is required under Article 60 when the convening authority cannot modify the findings or sentence, and no written advice is required when the convening authority has substantial discretion to do so.

[7] This is the result of the intersection of qualifying offenses under Articles 60, and the requirements under Article 66 to qualify for appellate review. These cases fall into one of two categories: (1) cases in which the confinement adjudged was for six months or less, no punitive discharge was awarded, but the offense was punishable by more than two years of confinement; and (2) cases in which the accused was sentenced to between six and twelve months of confinement, and did not receive a punitive discharge.

5. Relationship to Federal Civilian Practice

Article 60 has no direct counterpart in federal civilian practice. The closest approximation to the convening authority's role in "approving" the findings and sentence of a court-martial is the "entry of judgment" under Fed. R. Crim. P. 32(k). That rule describes the entry of judgment in federal cases as follows:

> In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

The entry of judgment is the tool by which the jurisdiction of the district court terminates and the case may be appealed. The time of entry of judgment fixes the time within which an appeal may be taken.

With respect to suspending a sentence, federal district court judges have broad authority to place a defendant on supervised release.[8]

6. Recommendation and Justification

Recommendation 60.1: Clarify and streamline the statutes governing post-trial processing of courts-martial.

This proposal would revise Article 60, creating three new articles and dividing the convening authority's post-trial powers among these articles.

Article 60. This proposal would amend Article 60 to provide for prompt forwarding of trial results to the parties, any victim, and the convening authority. As amended, Article 60 also would establish the authority for post-trial hearings to address any motions that may arise after the trial adjourns.

Article 60a. The proposed Article 60a would—

Retain the current prohibition on the convening authority to disapprove, commute, suspend, or modify a punitive discharge or a sentence to confinement if the total confinement running consecutively in the case exceeds six months;

Retain the convening authority's limited power to modify the remaining parts of an adjudged sentence in every case—including, for example, fines, forfeitures, reductions in rank, reprimands, and hard labor without confinement;

Provide the convening authority in all cases with a new limited authority to suspend a sentence of confinement or a punitive discharge upon a recommendation of the military judge (discussed below under Recommendation 60.2); and

[8] 18 U.S.C. §3583(a).

Preserve the convening authority's current authority in any case to reduce a sentence when an accused provides substantial assistance to the government (with a clarifying adjustment to the applicable time frame, discussed below under Recommendation 60.3).

Article 60b. This article would preserve the convening authority's discretion to act on the findings and sentence in a narrowly limited class of cases.

In all summary courts-martial, the convening authority would have the power to act on the findings and sentence. In view of the nature of a summary court-martial—a proceeding in which a judge does not preside and the accused does not have the right to counsel—the opportunity for corrective action by the convening authority is particularly important.

In addition, this proposal would maintain the convening authority's current discretion to act on the findings and sentence in general and special courts-martial in which: (1) the adjudged sentence does not include a punitive discharge; (2) the total of all confinement running consecutively does not exceed six months; (3) the maximum possible confinement that may be adjudged for any offense is two years or less; and (4) the adjudged offenses do not include Article 120(a)–(b), 120b, 125, or any other offense designated by the Secretary of Defense.

Article 60c. This Article would establish a new requirement for the military judge to make an entry of judgment into the record of trial in every case. This proposal is discussed in more detail below under Recommendation 60.5.

Recommendation 60.2: Under the proposed Article 60a, provide a limited authority to suspend sentences in cases where the military judge recommends suspension and the convening authority acts within the scope of the military judge's recommendation.

The NDAA FY 2014 amendments removed the convening authority's discretion to suspend a sentence of confinement for more than six months or a punitive discharge, with two exceptions: (1) upon recommendation of the trial counsel in recognition of substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense; and (2) when called for in a pretrial agreement.

Because military judges lack suspension authority, these changes have created a gap in the military justice system: Neither the judge nor the convening authority may suspend a punitive discharge or sentence to confinement for more than six months. Suspensions, however, may be appropriate in limited circumstances where the armed forces have invested substantially in training a servicemember, the member has committed misconduct warranting a period of confinement, and the member has demonstrated rehabilitative potential.

This proposal would provide a limited authority for suspension, but only in circumstances when a military judge recommends in writing that part of a sentence be suspended, and the convening authority determines that a period of suspension, not to exceed the suspension recommendation of the military judge, would be warranted. Under this proposal, a suspended sentence would require the concurrence of the military judge (who sentenced

the accused and saw the evidence) and the convening authority (whose act of suspension may allow the accused to return to the unit).

Recommendation 60.3: Under the proposed Article 60a, provide an expanded timeframe within which a convening authority can modify a sentence for an accused who provides substantial assistance in another case.

The current power of the convening authority to reduce a sentence for substantial assistance generally terminates when the convening authority acts on the case under Article 60. That is, an accused who provides assistance after he is sentenced for his own crimes may only be eligible for relief until convening authority action—a relatively short time period for the accused to notify the government of the ability to assist, provide the assistance in a separate prosecution or investigation, and then seek relief from the convening authority. An accused who is unable to assist the government until after convening authority action—for example, by becoming aware of evidence only after convening authority action—currently cannot receive relief under Article 60.

This proposal would extend the convening authority's timeframe to reduce the sentence of an accused who assists the government in prosecuting or investigating another person. Under this proposal, the authority to grant sentencing relief would not be triggered until the accused's provision of substantial assistance, encouraging timely cooperation by an accused. Part II of this Report will propose rules implementing this provision modeled on Fed. R. Crim. P. 35(b).

Recommendation 60.4: Streamline post-trial administrative requirements to match the changes to the convening authority's post-trial powers.

This proposal would revise post-trial procedural requirements to reflect the recent legislation that has substantially reduced the convening authority's power to modify the findings and sentence in most cases. The recent modifications to Article 60 reduced the convening authority's power in the post-trial process, but did not modify post-trial administrative requirements, which were developed at a time when the convening authority had broad power to modify the findings and sentence in every case.

This proposal would eliminate the requirement for a Staff Judge Advocate Recommendation and update the current requirement in Article 60 regarding the submission of matters by the accused and victim. Part II of this Report will propose flexible rules governing post-trial legal advice to the convening authority and will continue the current provisions for the accused and victim to submit matters to the convening authority.

This proposal would eliminate the requirement for the convening authority to take action in every special and general court-martial. Under the proposal, the military judge will be notified either that the convening authority has taken a specific action in the case or that the convening authority will not act on the case.

Part II of this Report will propose changes to the implementing rules to include eliminating the requirement for the preparation of written, authenticated transcripts prior to post-trial processing.

Recommendation 60.5: Require the military judge to make an "entry of judgment" to reflect the results of the court-martial as part of the proposed Article 60c.

Under this proposal, the military judge would enter the judgment of the court-martial into the record of trial. The entry of judgment would include the findings and sentence, and would incorporate any relevant terms of a plea agreement. In cases where the convening authority modifies the findings or sentence under Articles 60a or 60b, the entry of judgment would incorporate the convening authority's action. The entry of judgment would terminate the court-martial at the trial level.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to federal court insofar as practicable in military practice, and by ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law.

This proposal supports MJRG Operational Guidance by enhancing efficiency during the post-trial phase of the court-martial process.

This proposal is related to the proposed creation of Article 53a (Plea Agreements) and the proposed amendments to Article 54 (Record of Trial).

8. Legislative Proposal

SEC. 901. POST-TRIAL PROCESSING IN GENERAL AND SPECIAL COURTS-MARTIAL.

Section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

"§860. Art. 60. Post-trial processing in general and special courts-martial

"(a) STATEMENT OF TRIAL RESULTS.—(1) The military judge of a general or special court-martial shall enter into the record of trial a document entitled 'Statement of Trial Results', which shall set forth—

"(A) each plea and finding;

"(B) the sentence, if any; and

"(C) such other information as the President may prescribe by regulation.

"(2) Copies of the Statement of Trial Results shall be provided promptly to the convening authority, the accused, and any victim of the offense.

"(b) POST-TRIAL MOTIONS.—In accordance with regulations prescribed by the President, the military judge in a general or special court-martial shall address all post-trial motions and other post-trial matters that—

"(1) may affect a plea, a finding, the sentence, the Statement of Trial Results, the record of trial, or any post-trial action by the convening authority; and

"(2) are subject to resolution by the military judge before entry of judgment.".

SEC. 902. LIMITED AUTHORITY TO ACT ON SENTENCE IN SPECIFIED POST-TRIAL CIRCUMSTANCES.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860 (article 60 of the Uniform Code of Military Justice), as amended by section 901, the following new section (article):

"§860a. Art. 60a. Limited authority to act on sentence in specified post-trial circumstances

"(a) IN GENERAL.—(1) The convening authority of a general or special court-martial described in paragraph (2)—

"(A) may act on the sentence of the court-martial only as provided in subsection (b), (c), or (d); and

"(B) may not act on the findings of the court-martial.

"(2) The courts-martial referred to in paragraph (1) are the following:

"(A) A general or special court-martial in which the maximum sentence of confinement established under subsection (a) of section 856 of this title (article 56) for any offense of which the accused is found guilty is more than two years.

"(B) A general or special court-martial in which the total of the sentences of confinement imposed, running consecutively, is more than six months.

"(C) A general or special court-martial in which the sentence imposed includes a dismissal, dishonorable discharge, or bad-conduct discharge.

"(D) A general or special court-martial in which the accused is found guilty of a violation of subsection (a) or (b) of section 920 of this title (article 120), section 920b of this title (article 120b), or such other offense as the Secretary of Defense may specify by regulation.

"(3) Except as provided in subsection (d), the convening authority may act under this section only before entry of judgment.

"(4) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) REDUCTION, COMMUTATION, AND SUSPENSION OF SENTENCES GENERALLY.—(1) Except as provided in subsection (c) or (d), the convening authority may not reduce, commute, or suspend any of the following sentences:

"(A) A sentence of confinement, if the total period of confinement imposed for all offenses involved, running consecutively, is greater than six months.

"(B) A sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(C) A sentence of death.

"(2) The convening authority may reduce, commute, or suspend any sentence not specified in paragraph (1).

"(c) SUSPENSION OF CERTAIN SENTENCES UPON RECOMMENDATION OF MILITARY JUDGE.—(1) Upon recommendation of the military judge, as included in the Statement of Trial Results, together with an explanation of the facts supporting the recommendation, the convening authority may suspend—

"(A) a sentence of confinement, in whole or in part; or

"(B) a sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(2) The convening authority may not, under paragraph (1)—

"(A) suspend a mandatory minimum sentence; or

"(B) suspend a sentence to an extent in excess of the suspension recommended by the military judge.

"(d) REDUCTION OF SENTENCE FOR SUBSTANTIAL ASSISTANCE BY ACCUSED.—(1) Upon a recommendation by the trial counsel, if the accused, after sentencing and before entry of judgment, provides substantial assistance in the investigation or prosecution of another person, the convening authority may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(2) Upon a recommendation by a trial counsel, designated in accordance with rules prescribed by the President, if the accused, after entry of judgment, provides substantial assistance in the investigation or prosecution of another person, a convening authority, designated under such regulations, may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(3) In evaluating whether the accused has provided substantial assistance under this subsection, the convening authority may consider the presentence assistance of the accused.

"(e) SUBMISSIONS BY ACCUSED AND VICTIM.—(1) In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of an offense. Such rules shall include—

"(A) procedures for notice of the opportunity to make such submissions;

"(B) the deadlines for such submissions; and

"(C) procedures for providing the accused and any victim of an offense with a copy of the recording of any open sessions of the court-martial and copies of, or access to, any admitted, unsealed exhibits.

"(2) The convening authority shall not consider under this section any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.

"(f) DECISION OF CONVENING AUTHORITY.—(1) The decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If, under this section, the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall include a written explanation of the reasons for such action.

"(3) If, under subsection (d)(2), the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall be forwarded to the chief trial judge for appropriate modification of the entry of judgment, which shall be transmitted to the Judge Advocate General for appropriate action.".

SEC. 903. POST-TRIAL ACTIONS IN SUMMARY COURTS-MARTIAL AND CERTAIN GENERAL AND SPECIAL COURTS-MARTIAL.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860a (article 60a of the Uniform Code of Military Justice), as amended by section 902, the following new section (article):

"§860b. Art. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial

"(a) IN GENERAL.—(1) In a court-martial not specified in subsection (a)(2) of section 860a of this title (article 60a), the convening authority may—

"(A) dismiss any charge or specification by setting aside the finding of guilty;

"(B) change a finding of guilty to a charge or specification to a finding of guilty to a lesser included offense;

"(C) disapprove the findings and the sentence and dismiss the charges and specifications;

"(D) disapprove the findings and the sentence and order a rehearing as to the findings and the sentence;

"(E) disapprove, commute, or suspend the sentence, in whole or in part; or

"(F) disapprove the sentence and order a rehearing as to the sentence.

"(2) In a summary court-martial, the convening authority shall approve the sentence or take other action on the sentence under paragraph (1).

"(3) Except as provided in paragraph (4), the convening authority may act under this section only before entry of judgment.

"(4) The convening authority may act under this section after entry of judgment in a general or special court-martial in the same manner as the convening authority may act under subsection (d)(2) of section 860a of this title (article 60a). Such action shall be forwarded to the chief trial judge, who shall ensure appropriate modification to the entry of judgment and shall transmit the entry of judgment to the Judge Advocate General for appropriate action.

"(5) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) LIMITATIONS ON REHEARINGS.—The convening authority may not order a rehearing under this section—

"(1) as to the findings, if there is insufficient evidence in the record to support the findings;

"(2) to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

"(3) to reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter.

"(c) SUBMISSIONS BY ACCUSED AND VICTIM.—In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of the offense. Such rules shall include the matter required by subsection (e) of section 860a of this title (article 60a).

"(d) DECISION OF CONVENING AUTHORITY.—(1) In a general or special court-martial, the decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If the convening authority acts on the findings or the sentence under subsection (a)(1), the decision of the convening authority shall include a written explanation of the reasons for such action."

SEC. 904. ENTRY OF JUDGMENT.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860b (article 60b of the Uniform Code of Military Justice), as added by section 903, the following new section (article):

"§860c. Art 60c. Entry of judgment

"(a) ENTRY OF JUDGMENT OF GENERAL OR SPECIAL COURT-MARTIAL.—(1) In accordance with rules prescribed by the President, in a general or special court-martial, the military judge shall enter into the record of trial the judgment of the court. The judgment of the court shall consist of the following:

"(A) The Statement of Trial Results under section 860 of this title (article 60).

"(B) Any modifications of, or supplements to, the Statement of Trial Results by reason of—

"(i) any post-trial action by the convening authority; or

"(ii) any ruling, order, or other determination of the military judge that affects a plea, a finding, or the sentence.

"(2) Under rules prescribed by the President, the judgment under paragraph (1) shall be—

"(A) provided to the accused and to any victim of the offense; and

"(B) made available to the public.

"(b) SUMMARY COURT-MARTIAL JUDGMENT.—The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under section 860b of this title (article 60b), constitutes the judgment of the court-martial and shall be recorded and distributed under rules prescribed by the President.".

9. Sectional Analysis

Sections 901-904 concern post-trial processing and post-trial action by the convening authority. These processes are currently prescribed under Article 60 (Action by the convening authority). These sections would amend Article 60 of the UCMJ in its entirety.

Section 901 would amend Article 60 to provide for the distribution of the trial results and to authorize the filing of post-trial motions with the military judge in general and special courts-martial. The convening authority's role in post-trial processing would be moved to new Articles 60a and 60b. *See* Sections 902-903, *infra.* Article 60, as amended, would include the following provisions:

Article 60(a) would require the military judge to immediately enter into the record the Statement of Trial Results, consisting of the pleas of the accused, the findings and sentence of the court-martial, and any other information required by the President. The statute would require that copies be provided to the convening authority, the accused, and any victim of any offense. The statement of trial results would serve as the basis for the entry of judgment under Article 60c.

Article 60(b) would require the President to establish rules governing submission of post-trial motions to the military judge. The implementing rules would establish filing deadlines for the parties and provide explicit authority for the military judge and convening authority to direct post-trial hearings when necessary to address allegations of legal error. The authority to order post-trial hearings would replace the previous authority to order proceedings in revision. *See* Article 60(f)(1)-(2).

Section 902 would create a new section, Article 60a (Limited authority to act on sentence in specified post-trial circumstances), which would retain current limitations on the convening authority's post-trial actions in most general and special courts-martial, subject

to a narrowly limited suspension authority under Article 60a(c) and a revised authority related to substantial assistance under Article 60a(d). Article 60a, as proposed, would contain the following provisions:

Article 60a(a)-(b) would retain and clarify existing limitations on the convening authority's post-trial actions in general and special courts-martial in which: (1) the maximum sentence of confinement for any offense is more than two years; (2) adjudged confinement exceeds six months; (3) the sentence includes dismissal or discharge; or (4) the accused is found guilty of designated sex-related offenses. Under current law, the convening authority in such cases is prohibited from modifying the findings of the court-martial, or reducing, commuting, or suspending a punishment of death, confinement of more than six months, or a punitive discharge.

Article 60a(c) would provide a limited suspension authority in specified circumstances. For the convening authority to exercise this authority, the military judge would be required to make a specific suspension recommendation in the Statement of Trial Results. The suspension authority under subsection (c) would be limited to punishments of confinement in excess of six months and punitive discharges.

Article 60a(d) would retain, with clarifying amendments, the key features of current law with respect to the convening authority's power to reduce the sentence of an accused who assists in the prosecution or investigation of another person. As amended, the President may prescribe rules providing for a convening authority to exercise this power after entry of judgment. This provision is designed to allow for the reduction of a sentence of an accused who provides substantial assistance in the prosecution of another person, even well after his own trial is over and appellate review is complete. The implementing rules will be modeled on Fed. R. Crim. P. 35(b).

Article 60a(e) would allow the accused and a victim of the offense to submit matters to the convening authority for consideration. The implementing rules would establish the timelines for submitting matters under this subsection and procedures for responding to submissions. The implementing rules also would require the accused and victim to have a copy or access to the recording of the open sessions of the court-martial and admitted unsealed exhibits.

Article 60a(f) would require the decision of the convening authority to be forwarded to the military judge. If the convening authority modified the sentence of the court-martial, the convening authority would be required to explain the reasons for the modification. An explanation for the convening authority's decision would only be required when the convening authority modifies the sentence. No approval of the findings or sentence would be required. The decision of the convening authority would be forwarded to the military judge, who would incorporate any change in the sentence into the entry of judgment. In a case where the accused provides substantial assistance under subsection (d) and a designated convening authority reduces the sentence of the accused after entry of judgment, the convening authority's action would be forwarded to the chief trial judge, who would be responsible for ensuring appropriate modification of the entry of judgment.

Because a modification might happen during or after the completion of appellate review, the modified entry of judgment would be forwarded to the Judge Advocate General for appropriate action.

Section 903 would create a new section, Article 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial). The new section would retain and clarify the convening authority's post-trial authorities and responsibilities with respect to the findings and sentence of a court-martial not covered by subsection (a)(2) of new Article 60a. This post-trial authority would be available in summary courts-martial and a limited number of general and special courts-martial which, because of the offenses charged and the sentence adjudged, would not be covered under Article 60a. Consistent with existing law, the convening authority in such cases would be authorized to act on the findings and the sentence, and could order rehearings, subject to certain limitations. The procedural requirements under Article 60b, to include consideration of matters submitted by the accused and victim, would be the same as those provided in Article 60a. In summary courts-martial, the convening authority would be required to act on the sentence, and would have discretion to act on the findings, as under current law.

Section 904 would create a new section, Article 60c (Entry of judgment). The entry of judgment would require the military judge to enter the judgment of the court-martial into the record in all general and special courts-martial, and would mark the conclusion of trial proceedings. The judgment would reflect the Statement of Trial Results, any action by the convening authority on the findings or sentence, and any post-trial rulings by the military judge. The judgment also would indicate the time when the accused's case becomes eligible for direct appeal to a Court of Criminal Appeals under Article 66, or for review by the Judge Advocate General under Article 65. This requirement for an entry of judgment is modeled after Fed. R. Crim. P. 32(k). The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under Article 60b, would constitute the judgment of the court-martial.

Article 61 – Waiver or Withdrawal of Appeal
10 U.S.C. § 861

1. Summary of Proposal

This proposal would make conforming changes to Article 61 to align it with proposed revisions to Articles 60, 65, and 69, as well as the proposal to enact a new Article 60c (Entry of judgment). This proposal also would modify references in Article 61 to Articles 66 and 69, to conform the statute to proposed changes to those articles and to the appellate process generally. Part II of the Report will address changes in the rules implementing Article 61 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 61 provides that an accused may file a statement with the convening authority after he or she takes action expressly waiving the right to appellate review under Article 66 (Review by Court of Criminal Appeals) or Article 69 (Review by the Office of the Judge Advocate General), unless the approved sentence includes death. The waiver must be signed by both the accused and defense counsel, and must be filed within 10 days after the accused is served with a copy of the convening authority's action under Article 60(c). The convening authority may extend this timeline for good cause for not more than 30 days. In addition, an accused may withdraw an appeal at any time, unless the approved sentence includes death.

3. Historical Background

Before 1983, appellate review could not be waived. In the Military Justice Act of 1983, Congress provided a narrow timeframe during which an accused could waive appellate review in non-capital cases.[1] Congress enacted this provision to "accommodate convicted servicemembers who were eager to be separated immediately—albeit, with a punitive discharge—and whose continued retention in the service hindered the military mission."[2] The waiver could be filed only within a 10-day period after the convening authority acted and the action was served on the accused or defense counsel.[3] The mandatory delay in waiving appellate review until after the convening authority's action provided the accused time to reflect on the consequences of the conviction and sentence, as approved by the convening authority, before weighing grounds to appeal, and to ensure that the court-

[1] Military Justice Act of 1983, Pub. L. No. 98–209, 97 Stat. 1393.

[2] United States v. Hernandez, 33 M.J. 145, 148 (C.M.A. 1991).

[3] S. REP. NO. 98-53, at 22 (1983).

martial produces "an accurate result and not merely one that an accused is willing to accept."[4]

4. Contemporary Practice

The President has implemented Article 61 through R.C.M. 1110, which provides additional rules and procedures concerning waiver and withdrawal from appellate review, including the right to counsel, the form and effect of waivers and withdrawals, and the applicable time limits for submission by the accused. Waiver of and withdrawal from appellate review occurs infrequently in military practice. In accordance with case law addressing the statute and the implementing rules, in order for a waiver under Article 61 to be accepted, it must be accompanied by proof that it was voluntary after full advice from counsel.[5]

5. Relationship to Federal Civilian Practice

Article 61 has no direct counterpart in federal civilian practice. In federal court, the accused must request appellate review by filing a notice of appeal.[6] There is no automatic appellate review, even in capital cases.[7] In civilian practice, "[t]he right to appeal can be waived in a plea agreement."[8] By way of comparison, Article 61 permits a waiver only after the convening authority approves the finding and sentence, and not as part of a plea agreement. Likewise, R.C.M. 705(c)(1)(B) prohibits any term or condition in a pretrial agreement that deprives the accused of the complete and effective exercise of post-trial and appellate rights. Given the unique pressures and circumstances of military life, the military system has retained the opportunity for appellate review "to ensure judicially that the accused's plea was provident, that the accused entered the plea agreement voluntarily, and that sentencing proceedings met acceptable standards."[9]

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[4] *Hernandez*, 33 M.J. at 148.

[5] *See* United States v. Miller, 62 M.J. 471 (C.A.A.F. 2006); *see also* MCM, App. 19 (Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Military Review (DD Form 2330)).

[6] FED. R. APP. P. 3.

[7] FED. R. APP. P. 4(b)(1)(A); 18 U.S.C. § 3595(a) (in a case in which a death sentence is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified).

[8] *See* FED. R. CRIM. P. 11(b)(1)(N) (requiring the judge to determine that the defendant understands the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence); United States v. Feichtinger, 105 F.3d 1188, 1190 (7th Cir. 1997), *cert. denied,* 520 U.S. 1281 (1997). *See also* In re Sealed Case, 702 F.3d 59, 63 (D.C. Cir. 2012) ("A waiver of the right to appeal a sentence is presumptively valid and is enforceable if the defendant's decision to waive is knowing, intelligent, and voluntary.").

[9] MCM, App. 21 (R.C.M. 705, Analysis).

6. Recommendation and Justification

Recommendation 61: Amend Article 61 to align the statute with proposed amendments to Articles 60, 65, and 69.

This is a conforming change only.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to federal courts insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 905. WAIVER OF RIGHT TO APPEAL AND WITHDRAWAL OF APPEAL.

Section 861 of title 10, United States Code (article 61 of the Uniform Code of Military Justice), is amended to read as follows:

"§861. Art. 61. Waiver of right to appeal; withdrawal of appeal

"(a) WAIVER OF RIGHT TO APPEAL.—After entry of judgment in a general or special court-martial, under procedures prescribed by the Secretary concerned, the accused may waive the right to appeal. Such a waiver shall be —

"(1) signed by the accused and by defense counsel; and

"(2) attached to the record of trial.

"(b) WITHDRAWAL OF APPEAL.—In a general or special court-martial, the accused may withdraw an appeal at any time.

"(c) DEATH PENALTY CASE EXCEPTION.—Notwithstanding subsections (a) and (b), an accused may not waive the right to appeal or withdraw an appeal with respect to a judgment that includes a sentence of death.

"(d) WAIVER OR WITHDRAWAL AS BAR.—A waiver or withdrawal under this section bars review under section 866 of this title (article 66).".

9. Sectional Analysis

Section 905 would amend Article 61, which provides that an accused may file a statement with the convening authority expressly waiving the right to appellate review under Article 66 or Article 69. The amendments would conform the statute to the changes proposed in Articles 60, 65, and 69 concerning post-trial processing. *See* Sections 901-904, *supra*; Sections 909, 913, *infra*.

Article 62 – Appeal by the United States
10 U.S.C. § 862

1. Summary of Proposal

This proposal would align interlocutory appeals in the military more closely with federal civilian practice. Part II of the Report will consider whether changes are needed in the rules implementing Article 62.

2. Summary of the Current Statute

Article 62 provides a limited basis for government interlocutory appeals. Under the statute, such appeals generally are limited to: (1) cases that may award a punitive discharge; (2) dismissal of specifications; (3) rulings and orders dealing with classified information; and (4) the exclusion of key government evidence. Currently, there is no jurisdiction under Article 62 for the government to appeal a military judge's decision to set aside a panel's guilty verdict based on legally insufficient evidence.

3. Historical Background

In the Military Justice Act of 1983, Congress amended Article 62 to provide authority for interlocutory government appeals.[1] Congress based this statutory change on 18 U.S.C. § 3731, the statute applicable to the trial of criminal cases in the federal district courts, with the goal of "allow[ing] appeal by the government under procedures similar to an appeal by the United States in a federal civilian prosecution."[2]

4. Contemporary Practice

The President has implemented Article 62 through R.C.M. 908, which provides the rules and procedures for government appeals. Under the rule, appeals are limited to courts-martial presided over by a military judge where a bad-conduct discharge could be adjudged.[3] Government appeals are limited to rulings and orders excluding key evidence, dismissing charges or specifications, or involving the protection of classified information.[4] After a military judge issues such a ruling, a trial counsel may request a 72-hour delay to decide whether to appeal the order.[5] To pursue an appeal, the trial counsel must file a

[1] Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983).

[2] S. REP. NO. 98-53, at 6 (1983).

[3] R.C.M. 908(a).

[4] *Id.*

[5] R.C.M. 908(b).

notice of appeal with the judge within that same 72-hour period. An appeal cannot be taken for the purposes of delay. In general, notice of appeal stays the court-martial, with two exceptions. First, an appeal under Article 62 does not prohibit the military judge from addressing motions unrelated to the matter being appealed. Second, the affected charges may be severed under R.C.M. 906, or with the concurrence of all parties. The rule provides that the government shall diligently prosecute the appeal, and that the Court of Criminal Appeals shall prioritize the appeal over other issues if practical.[6]

5. Relationship to Civilian Practice

In federal civilian practice, government appeals are authorized under 18 U.S.C. § 3731. Although Article 62 is based upon this Title 18 provision, there are several differences between the two provisions. First, under Section 3731, the government may appeal the release of a defendant from confinement.[7] Such appeals must be taken within thirty days of the judge's determination and must be "diligently prosecuted." Second, the government may appeal a finding of not guilty under Section 3731 as long as there is no violation of the Double Jeopardy Clause (e.g. upon motion by the defense, the judge enters a finding of not guilty after the jury returns a guilty verdict).[8] Third, the Courts of Appeals are required to liberally construe the provisions in Section 3731 authorizing government interlocutory appeals.[9]

6. Recommendation and Justification

Recommendation 62.1: Amend Article 62 to authorize the government to appeal a decision that terminates the proceedings as to a specification, except in cases where such an appeal would violate Article 44's prohibitions on double jeopardy.

This proposal would provide for government appeals in the same manner as federal civilian practice. Consistent with that practice, it would authorize an appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence.

Recommendation 62.2: Amend Article 62 to align the rule of construction with the similar rule applicable to the interlocutory appeals in federal civilian courts.

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[6] R.C.M. 908(c).

[7] 18 U.S.C. § 3731 ("An appeal by the United States shall lie . . . from a decision or order . . . granting the release of a person").

[8] 18 U.S.C. § 3731 ("An appeal by the United States shall lie . . . from a decision, judgment or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment . . . except that no appeal shall lie where the double jeopardy clause . . . prohibits further prosecution.").

[9] 18 U.S.C. § 3731 ("The provisions of this section shall be liberally construed to effectuate its purposes"). Article 62 does not contain a similar rule of construction. *See, e.g.*, United States v. Wuterich, 67 M.J. 63, 74 (2008); United States v. Vargas, 74 M.J. 1 (2014).

The final sentence in 18 U.S.C. § 3731, which authorizes interlocutory appeals in federal civilian courts, states that "[t]he provisions of this section shall be liberally construed to effectuate its purposes"[10] The federal civilian courts consider that rule of construction when interpreting provisions in Section 3731 that are similar to the provisions in Article 62. This proposal would better align Article 62 with the rule of construction applicable in federal civilian courts under 18 U.S.C. § 3731.

Recommendation 62.3: Amend Article 62 to conform to the proposed revisions to the review and appeal provisions under Articles 66 and 69.

Currently, the government may not file an interlocutory appeal in cases where a punitive discharge is not authorized. The prohibition on interlocutory appeals in cases where no punitive discharge may be adjudged reflects the fact that those cases were not entitled to appellate court review, except when certified by the Judge Advocate General.

This proposal amends Article 62 to eliminate the requirement that the court-martial must be able to adjudge a bad-conduct discharge as a jurisdictional prerequisite to filing an Article 62 appeal.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by: (1) employing the standards and procedures applicable to government interlocutory appeals in the federal civilian practice insofar as practicable in military criminal practice; (2) ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law; (3) enhancing efficiency during the post-trial phase of the court-martial process; and (4) addressing ambiguities and inconsistencies among Article 62, its implementing rules, and the case law interpreting the statute concerning applicable rule of construction, thereby reducing the potential for unnecessary litigation in this area.

Under the related provisions of Articles 66, the accused would have an opportunity to seek direct review of the findings in a case where the government had invoked interlocutory review under Article 62, including cases not otherwise eligible for direct review under Article 66. The Article 66 provision would ensure continuity in appellate review of a case.

8. Legislative Proposal

SEC. 906. APPEAL BY THE UNITED STATES.

Section 862 of title 10, United States Code (article 62 of the Uniform Code of Military Justice), is amended—

[10] 18 U.S.C. § 3731.

(1) in paragraph (1) of subsection (a)—

(A) in the matter before subparagraph (A), by striking "court-martial" and all that follows through the colon at the end and inserting "general or special court-martial or in a pretrial proceeding under section 830a of this title (article 30a), the United States may appeal the following:"; and

(B) by adding at the end the following new subparagraph:

"(G) An order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.";

(2) in paragraph (2) of subsection (a)—

(A) by striking "(2)" and inserting "(2)(A)"; and

(B) by adding at the end the following new subparagraph:

"(B) An appeal of an order or ruling may not be taken when prohibited by section 844 of this title (article 44)."; and

(3) by adding at the end the following:

"(d) The United States may appeal a ruling or order of a military magistrate in the same manner as had the ruling or order been made by a military judge, except that the issue shall first be presented to the military judge who designated the military magistrate or to a military judge detailed to hear the issue.

"(e) The provisions of this article shall be liberally construed to effect its purposes.".

9. Sectional Analysis

Section 906 concerns government interlocutory appeals. Presently, Article 62 provides a limited basis for government interlocutory appeals. This section would amend Article 62 to better align interlocutory appeals in the military with federal civilian practice, by authorizing an appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence. Additionally, the amendments would better align Article 62 with the rule of construction applicable to 18 U.S.C. § 3731, by directing military courts to liberally construe the statute's provisions to effect its purposes. As amended, the authority for interlocutory appeals under Article 62 would be extended to all general and special courts-martial, which would replace the current limitation authorizing such appeals only if the offense at issue carries the potential for a punitive discharge.

Article 63 – Rehearings
10 U.S.C. § 863

1. Summary of Proposal

This proposal would amend Article 63 to align the sentencing limitations at a rehearing with federal civilian practice in two circumstances. First, if an accused at a rehearing has changed a prior plea of guilty to a plea of not guilty or otherwise has not complied with the terms of a pretrial agreement, the sentence would not be limited to the sentence imposed at the earlier trial. Second, if the government on appeal obtains an order for a rehearing on the sentence under this Report's proposal for Article 56, the sentence at the rehearing is not limited to the sentence erroneously adjudged at the earlier trial. Part II of the Report will address changes in the rules implementing Article 63 that will be necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 63 limits the findings and sentences that may be adjudged at a rehearing. For findings, the statute precludes a rehearing on any offense for which the accused was found not guilty by the first court-martial. In this respect, Article 63 is consistent with the Double Jeopardy Clause.[1] With respect to sentencing, Article 63 prohibits the court-martial from imposing a higher sentence at a rehearing than was approved by the convening authority at the first trial, with three exceptions: (1) when the accused is convicted of offenses at the rehearing that were not part of the prior trial; (2) when a mandatory minimum sentence is required by law; and (3) when the accused pleaded guilty at the first trial pursuant to a pretrial agreement and the accused at the rehearing either changes the plea to not guilty with respect to the offenses covered by the pretrial agreement or fails to comply with the terms of the pretrial agreement. When a case falls within the third category, Article 63 limits the sentence that can be approved after a rehearing to the sentence adjudged by the court-martial at the first trial.

3. Historical Background

Article 63, which was derived from Article 52 of the Articles of War, contained a prohibition against any increase in the sentence upon a rehearing.[2] As pretrial agreements came into general use in the 1950s and 1960s, the rigidity of the prohibition on any

[1] *Compare* Article 63, UCMJ ("Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial . . .") *with* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."); *see also* Article 44(a) ("No person may, without his consent, be tried a second time for the same offense.").

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1180 (1949).

increase in punishment at a rehearing had an unintended consequence: An accused who entered a not guilty plea at the rehearing could nonetheless retain the benefit of the sentence cap resulting from the plea agreement at the original trial because, under then-existing law, the sentence at rehearing could not exceed the sentence approved by convening authority after the first trial.[3] This took into account the fact that appeal of the accused's conviction was automatic. The statute was amended in 1983 to permit a limited increase in the sentence at a rehearing if the accused changed his plea from guilty to not guilty. Under Article 63, as amended, the sentence at the rehearing may exceed the sentence approved by the convening authority at the first court-martial but may not exceed the sentence that was adjudged by the first court-martial.[4] Other than this change, the statute has not been amended significantly since the UCMJ was enacted in 1950.[5]

4. Contemporary Practice

The President has implemented Article 63 through R.C.M. 810, which provides additional rules and procedures applicable to rehearings and new trials. When the accused at the rehearing changes a plea from guilty to not guilty, the accused benefits from the first court-martial's consideration of the guilty plea as a mitigating factor, and the sentence at the rehearing is accordingly limited to the sentence adjudged at the first trial even though the plea has changed at the rehearing.

5. Relationship to Federal Civilian Practice

In federal civilian practice, federal defendants whose convictions are reversed on appeal are subject to retrial, and "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction."[6] This result rests on the premise that a defendant's original conviction is nullified at his behest, with the "slate wiped clean," as a direct result of the appeal.[7] In *Alabama v. Smith*, a unanimous Supreme Court held that a sentence could be increased at a retrial when a defendant changes a plea from guilty to not guilty.[8] Additionally, in federal civilian practice either a defendant or the government may appeal a sentence adjudged by the District Court. A sentence may be appealed because it is unlawful, the district judge misapplied the sentencing guidelines, or the sentence is unreasonable.[9]

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[3] *See generally* Randy V. Cargill, *The Article 63 Windfall*, 1989 ARMY LAW. 26 (Dec. 1989).

[4] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] North Carolina v. Pearce 395 U.S. 711, 720-721 (1969).

[7] *Id.*

[8] Alabama v. Smith, 490 U.S. 794, 803 (1989).

[9] *See* 18 U.S.C. § 3742(a-b). 18 U.S.C. § 3742(e) contained a detailed provision on appellate review of sentences; however, in *United States v. Booker*, 543 U.S. 220, 223 (2005), the Supreme Court excised the subsection and replaced it with a standard of reasonableness.

6. Recommendation and Justification

Recommendation 63: Amend Article 63 to remove the sentence limitation at a rehearing in cases in which: (1) an accused changes the plea from guilty to not guilty, or otherwise fails to comply with the terms a pretrial agreement; or (2) as a conforming change to the proposal under Article 56, a sentence is set aside based on a government appeal.

This proposal would better align military practice with federal civilian practice with respect to rehearings when an accused changes his or her plea or otherwise fails to comply with the terms of a plea agreement. Under the proposed amendments, an accused in these situations would be in the same position as if the guilty plea had not been taken in the first trial. This change would restore the parties to the position they were in at the beginning of the first trial with respect to the possible range of punishments.

Under the proposal for Article 56, after the establishment of sentencing parameters and criteria, the government would be able to appeal a sentence under certain conditions. As a conforming change to that proposal, this proposal amends Article 63 to allow a remedy after a successful government appeal.

The proposed amendments would continue the remaining limitations on the sentence that could be imposed at a rehearing. An accused who enters the same plea at the rehearing as at the first trial, or changes the plea from not guilty to guilty, would not face the possibility of an increased sentence at rehearing.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by better aligning military practice with federal civilian practice with respect to rehearings and new trials in the same case.

8. Legislative Proposal

SEC. 907. REHEARINGS.

Section 863 of title 10, United States Code (article 63 of the Uniform Code of Military Justice), is amended—

(1) by inserting “(a)” before “Each rehearing”;

(2) in the second sentence, by striking “may be approved” and inserting “may be adjudged”;

(3) by striking the third sentence; and

(4) by adding at the end the following new subsections:

"(b) If the sentence adjudged by the first court-martial was in accordance with a plea agreement under section 853a of this title (article 53a) and the accused at the rehearing does not comply with the agreement, or if a plea of guilty was entered for an offense at the first court-martial and a plea of not guilty was entered at the rehearing, the sentence as to those charges or specifications may include any punishment not in excess of that which could have been adjudged at the first court-martial.

"(c) If, after appeal by the Government under section 856(e) of this title (article 56(e)), the sentence adjudged is set aside and a rehearing on sentence is ordered by the Court of Criminal Appeals or Court of Appeals for the Armed Forces, the court-martial may impose any sentence that is in accordance with the order or ruling setting aside the adjudged sentence.".

9. Sectional Analysis

Section 907 would amend Article 63 to remove the sentence limitation at a rehearing in cases in which: (1) an accused changes his or her plea from guilty to not guilty, or otherwise fails to comply with the terms a pretrial agreement; or (2) a sentence is set aside based on a government appeal. The amendments would better align military practice with federal civilian practice in the area of rehearings.

Article 64 – Review by a Judge Advocate
10 U.S.C. § 864

1. Summary of Proposal

This proposal would amend Article 64 to limit its applicability to summary courts-martial. As amended, the article would address only the initial review of summary courts-martial, since they are not eligible for direct review by the Courts of Criminal Appeals under Article 66 (Review by Courts of Criminal Appeals). In a related proposal, Article 65 (Transmittal and Review of Records) would address the initial review of general and special courts-martial that are not eligible for direct review by the Courts of Criminal Appeals. Part II of the Report will address changes in the rules implementing Article 64 required by these statutory amendments.

2. Summary of the Current Statute

Article 64 provides for review of court-martial cases following the convening authority's action approving findings of guilty under Article 60 (Action of Convening Authority). Review under Article 64 applies to those cases not subject to automatic review under Article 66 (Review by Court of Criminal Appeals) and Article 69(a) (Review in the office of the Judge Advocate General). Article 64 applies to all summary courts-martial, and to special courts-martial in which a bad-conduct discharge was not adjudged. Article 64 currently requires a judge advocate to provide a written review of the case that includes conclusions as to jurisdiction, whether the charges and specifications stated offenses, and whether the sentence was within the limits prescribed by law. This review is also required to address any allegations of error submitted in writing by the accused. If the reviewing judge advocate recommends corrective action (and in certain other circumstances), the case is transmitted to the general court-martial convening authority, who has authority to take appellate corrective action on the case. If the convening authority disagrees with the recommendation, the case is transmitted to the Judge Advocate General for review under Article 69(b).

3. Historical Background

Since its inception, the UCMJ has required some form of legal review for minor cases. This review was initially required under Article 65.[1] In 1983, as part of the Military Justice Reform Act, the requirement was moved to Article 64.[2] Article 64 is the only direct appellate review available for summary court-martials. The summary court-martial is a unique military proceeding, designed to dispense justice promptly for relatively minor offenses under a simple form of procedure. Because of its summary nature, the Supreme

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

Court has stated that a summary court-martial is disciplinary in nature, rather than punitive, and does not result in a "criminal conviction."[3]

4. Contemporary Practice

The President has implemented Article 64 through R.C.M. 1112.

5. Relationship to Federal Civilian Practice

The summary court-martial is without a civilian counterpart. The closest comparison to summary court-martial offenses in the federal civilian system would be "Class C misdemeanors," punishable by confinement for thirty days or less but more than five days; and "infractions," punishable by confinement for five days or less.[4] Subject to limitations, such offenses may be tried by a magistrate judge in federal court. A federal defendant is entitled to an "appeal as of right" from a misdemeanor conviction, sentence, judgment or order by a U.S. magistrate judge to "a judge of the district court of the district in which the offense was committed."[5] A federal defendant is also entitled to an "appeal as of right" from a judgment or order of a federal district court to a circuit court of appeals.[6] Although there is no express provision for an appeal of right from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed as a matter of course.[7]

6. Recommendation and Justification

Recommendation 64: Amend Article 64 to apply only to summary courts-martial.

This proposal would amend Article 64 so that it applies only to the initial review of summary courts-martial. The proposal for Article 65 addresses the review of all general and special courts-martial that do not qualify for direct review by the Courts of Criminal Appeals.

This proposal would make no substantive change to the procedures or scope of review of summary courts-martial. Part II of this Report will address the opportunity for an accused to consult with counsel before filing any matter in connection with an Article 64 review.

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[3] Middendorf v. Henry, 425 U.S. 25, 34 (1976).

[4] 18 U.S.C. § 3559 (Sentencing classification of offenses).

[5] 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2).

[6] 28 U.S.C. § 1291; FED. R. APP. P. 3 & 4(c).

[7] *See* United States v. Forcellati, 610 F.2d 25, 28 (1st Cir. 1979) ("While there is thus no express provision for even the defendant to appeal from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed apparently as a matter of course . . . . The statutory grant to the courts of appeals of jurisdiction to review "all final decisions" of district courts is literally sufficient to include final decisions reviewing criminal convictions before magistrates, and no reason for excluding them from its embrace appears. Indeed, the assurance of that further review in the courts of appeals encourages use of magistrates' trials for minor offenses.") (quoting 28 U.S.C. § 1291).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law.

8. Legislative Proposal

SEC. 908. JUDGE ADVOCATE REVIEW OF FINDING OF GUILTY IN SUMMARY COURT-MARTIAL.

(a) IN GENERAL.—Subsection (a) of section 864 of title 10, United States Code (article 64 of the Uniform Code of Military Justice), is amended by striking the first two sentences and inserting the following:

"(a) IN GENERAL.—Under regulations prescribed by the Secretary concerned, each summary court-martial in which there is a finding of guilty shall be reviewed by a judge advocate. A judge advocate may not review a case under this subsection if the judge advocate has acted in the same case as an accuser, preliminary hearing officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The heading for such section (article) is amended to read as follows:

"§864. Art. 64. Judge advocate review of finding of guilty in summary court-martial".

(2) Subsection (b) of such section is amended—

(A) by striking "(b) The record" and inserting "(b) RECORD.—The record";

(B) by inserting "or" at the end of paragraph (1);

(C) by striking paragraph (2); and

(D) by redesignating paragraph (3) as paragraph (2).

(3) Subsection (c)(3) of such section (article) is amended by striking "section 869(b) of this title (article 69(b))." and inserting "section 869 of this title (article 69).".

9. Sectional Analysis

Section 908 concerns review of court-martial cases not otherwise subject to appellate review under Article 66 or review by the Office of the Judge Advocate General under Article 69. Under current law, Article 64 provides for judge advocate review of such cases, including conclusions as to jurisdiction, whether the charges and specifications stated offenses, and whether the sentence was within the limits prescribed by law. This section would amend Article 64 to apply only to the initial review of summary courts-martial. Article 65, as amended, would provide for review of general and special courts-martial that do not qualify for direct review by the Courts of Criminal Appeals. No substantive changes to the procedures or scope of review of summary courts-martial would be made. Implementing rules will address the opportunity for an accused to consult with counsel before filing any matter in connection with an Article 64 review.

Article 65 – Disposition of Records
10 U.S.C. § 865

1. Summary of Proposal

This proposal would amend Article 65 to provide additional guidance on the disposition of records of trial. The proposed amendments would require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for direct review under Article 66. For those cases that are not eligible for direct appellate review under Article 66, the proposal would provide for a limited form of review similar to the limited review that currently is provided under Article 64. Part II of the Report will address changes in the rules implementing Article 65 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 65 concerns the disposition of court-martial records. It requires that the records of trial in all cases subject to review under either Article 66 (review by Court of Criminal Appeals) or Article 69 (review in the office of the Judge Advocate General) be forwarded to the Judge Advocate General for appropriate action unless the accused has waived the right to review or an appeal has been withdrawn. The transmitted records of trial are then either forwarded to the Court of Criminal Appeals under Article 66 or reviewed by the Office of the Judge Advocate General under Article 69. All other records are handled in accordance with service regulations.

3. Historical Background

Article 65 was derived from Articles 35 and 36 of the Articles of War and proposed Articles 21 and 39 of the Articles for the Government of the Navy.[1] The original statute required that a judge advocate review any court-martial that was not subject to any other appellate review (i.e. summary courts-martial and special courts-martial without a bad-conduct discharge).[2] In 1983, Congress amended Article 65 by moving the requirement for a review by a judge advocate to Article 64.[3]

4. Contemporary Practice

The President has implemented Article 65 through R.C.M. 1111. Under the rule, the records of trial in all general courts-martial and in special courts-martial in which a bad-conduct discharge was adjudged are forwarded to the Judge Advocate General unless the accused

[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1186 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

waives appeal. Cases forwarded to the Judge Advocate General are then reviewed under Article 66 (review by Court of Criminal Appeals) or Article 69 (review in the office of the Judge Advocate General), depending on the sentences adjudged. Cases not forwarded to the Judge Advocate General are reviewed by a judge advocate under Article 64 (review by a judge advocate).

5. Relationship to Federal Civilian Practice

Federal civilian practice and military practice differ in the treatment of records of trial. Under federal practice, the appellant has the responsibility to identify and request a transcript of those parts of the proceedings the appellant considers to be necessary for the appeal.[4] After ordering transcripts, it is the appellant's duty to "do whatever else is necessary to enable the clerk to assemble and forward the record."[5] The court clerk then forwards the record of trial to the appellate court.[6]

6. Recommendation and Justification

Recommendation 65.1: Amend Article 65 by requiring that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for an appeal under Article 66.

Under the related proposal concerning Article 66, any sentence that exceeds six months of confinement, includes a punitive discharge, or where the government has previously appealed under Article 62 would be eligible for direct appeal to a Court of Criminal Appeals. This proposal would require the Judge Advocate General to notify the accused of the right to appeal in all such cases and to provide appellate defense counsel with a copy of the record of trial. The appellate defense counsel would then be required to review the record and advise the accused on the merits of filing an appeal. Upon request of the accused, appellate defense counsel would file an appeal on behalf of the accused.

This proposal would continue to require mandatory appellate review in all cases that include a sentence of death.

Recommendation 65.2: Amend Article 65 to require a review by the Judge Advocate General of all general and special court-martial cases not eligible for direct appeal under Article 66.

The proposed review would be similar to the review currently conducted under Article 64, and would apply to cases in which the sentence does not contain a punitive discharge and includes confinement for six months or less, and where the government has not previously appealed under Article 62 (i.e., cases that do not qualify for direct review in the Court of Criminal Appeals under Article 66). The review would be conducted by an attorney in the

[4] FED. R. APP. P. 10(b).

[5] FED. R. APP. P. 11(a).

[6] FED. R. APP. P. 11(b)(2).

Office of the Judge Advocate General or designated by the Judge Advocate General. For this review, the accused would have an opportunity to submit a list of legal errors in writing. This review would state conclusions as to whether the court had jurisdiction over the accused and the offense; whether the charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. It also would provide a response to each allegation of error made in writing by the accused.

Under the related proposed amendments to Article 64, summary courts-martial would be reviewed under the procedures of that Article.

General and special courts-martial reviewed under this proposal also would be eligible for further review by the Judge Advocate General under the standards set forth in the proposed revision to Article 69. All cases reviewed under Article 69, including summary courts martial, would then become eligible for appellate review by the Courts of Criminal Appeals, either by certification of the Judge Advocate General or through an application from the accused for discretionary review.[7]

Recommendation 65.3: Amend Article 65 to require a review of all general and special courts-martial cases that are eligible for an appeal under Article 66, but where appeal has been waived, withdrawn, or not filed.

This proposed review would be similar to the review currently conducted under Article 64 and would be conducted by an attorney in the Office of the Judge Advocate General or another attorney designated under rules established by the military department concerned. These rules could include review in the field, as under the current version of Article 64. The limited review would focus on whether the court-martial had jurisdiction over the accused and the offense, whether the charges and specifications each stated an offense, and whether the adjudged sentence was within the limits prescribed as a matter of law.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating, insofar as practicable, the appellate practices used in U.S. district courts.

This proposal supports MJRG Operational Guidance by enhancing efficiency during the post-trial phase of the court-martial process.

[7] The proposal for Article 69 would end the automatic review of general courts-martial under Article 69(a), but would provide for review upon request.

8. Legislative Proposal

SEC. 909. TRANSMITTAL AND REVIEW OF RECORDS.

Section 865 of title 10, United States Code (article 65 of the Uniform Code of Military Justice), is amended to read as follows:

"§865. Art. 65. Transmittal and review of records

"(a) TRANSMITTAL OF RECORDS.—(1) If the judgment of a general or special court-martial entered under section 860c of this title (article 60c) includes a finding of guilty, the record shall be transmitted to the Judge Advocate General.

"(2) In all other cases, records of trial by court-martial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

"(b) CASES ELIGIBLE FOR DIRECT APPEAL—

"(1) MANDATORY REVIEW.—If the judgment includes a sentence of death, the Judge Advocate General shall forward the record of trial to the Court of Criminal Appeals for review under section 866(b)(2) of this title (article 66(b)(2)).

"(2) CASES ELIGIBLE FOR DIRECT APPEAL REVIEW.—(A) If the case is eligible for direct review under section 866(b)(1) of this title (article 66(b)(1)), the Judge Advocate General shall—

"(i) forward a copy of the record of trial to an appellate defense counsel who shall be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals; and

"(ii) upon written request of the accused, forward a copy of the record of trial to civilian counsel provided by the accused.

"(B) Subparagraph (A) shall not apply if the accused—

"(i) waives the right to appeal under section 61 of this title (article 61); or

"(ii) declines in writing the detailing of appellate defense counsel under paragraph (2)(A)(i).

"(c) NOTICE OF RIGHT TO APPEAL.—(1) The Judge Advocate General shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1)) by means of depositing in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the official service record of the accused.

"(2) Paragraph (1) shall not apply if the accused waives the right to appeal under section 61 of this title (article 61).

"(d) REVIEW BY JUDGE ADVOCATE GENERAL.—

"(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

"(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (2) of section 866(b) of this title (article 66(b)).

"(B) A review referred to in subparagraph (A) shall include a written decision providing each of the following:

"(i) A conclusion as to whether the court had jurisdiction over the accused and the offense.

"(ii) A conclusion as to whether the charge and specification stated an offense.

"(iii) A conclusion as to whether the sentence was within the limits prescribed as a matter of law.

"(iv) A response to each allegation of error made in writing by the accused.

"(3) REVIEW WHEN DIRECT APPEAL IS WAIVED, WITHDRAWN OR NOT FILED.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial if—

"(i) the accused waives the right to appeal or withdraws appeal under section 861 of this title (article 61); or

"(ii) the accused does not file a timely appeal in a case eligible for direct appeal under subparagraph (A) or (B) of section 866(b)(1) of this title (article 66(b)(1)).

"(B) A review referred to in subparagraph (A) shall include a written decision limited to providing conclusions on the matters specified in clauses (i), (ii), and (iii) of paragraph (2)(B).

"(e) REMEDY.—(1) If after a review of a record under subsection (d), the attorney conducting the review believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part.

"(2) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

"(3)(A) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(B) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.".

9. Sectional Analysis

Section 909 would amend Article 65 to conform the statute to the changes proposed in Articles 66 and 69. *See* Sections 910, 914, *infra.* As amended, Article 65 would: (1) provide additional guidance on the disposition of records; (2) require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for direct review under Article 66; and (3) provide for appellate review of all cases that are not

subject to direct appellate review by a Court of Criminal Appeals, similar to the current review under Article 64. As amended, Article 65 would contain the following provisions:

Article 65(a) would require the record of trial in all general and special courts-martial in which there is a finding of guilty to be transmitted to the Office of the Judge Advocate General. In all other cases, the records of trial would be transmitted and disposed of in accordance with service regulations.

Article 65(b) would address the processing of records of trial in cases eligible for direct appeal to a Court of Criminal Appeals. Under paragraph (1), consistent with current practice, if the judgment of the court-martial included a sentence of death, the Judge Advocate General would be required to forward the record of trial to the Court of Criminal Appeals for automatic review. Paragraph (2) would address processing of records of trial in cases eligible for direct review by a Court of Criminal Appeals under Article 66(b)(1). The Judge Advocate General would be required to forward a copy of the record to an appellate defense counsel, who would be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals. The appellate defense counsel would review the record, advise the accused on the merits of an appeal, and, upon request, file the appeal with the Court of Criminal Appeals. The accused would be able to request that a copy of the record of trial be forwarded to civilian counsel provided by the accused. These provisions would not apply if the accused waived the right to appeal under Article 61 or declined representation by appellate defense counsel.

Article 65(c) would require the Judge Advocate General to provide a "Notice of the Right to Appeal" to an accused eligible to file an appeal under Article 66(b)(1).

Article 65(d) would provide for limited review by an attorney within the Office of Judge Advocate General, or another attorney designated under service regulations, in cases not eligible for direct appeal to a Court of Criminal Appeals under Articles 66(b). Cases not eligible for direct review under Article 66 would be those in which a punitive discharge was not imposed and confinement imposed was for six months or less. The review would focus on three issues: whether the court-martial had jurisdiction over the accused and the offense; whether each charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. The review also would include a response to any allegation of error submitted by the accused in writing. Under paragraph (3), this limited review—except for the response to allegations of error—also would be provided when an accused who is eligible to file an appeal for direct review under Article 66 waives or withdraws from appellate review, and when an accused fails to file an appeal under Article 66. This limited and expeditious review would satisfy a condition precedent to execution of certain sentences under Article 57 (Effective date of sentences), as amended. *See* Section 802, *supra.*

Article 65(e) would provide that, if the attorney conducting the review under subsection (d) believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part. If the Judge Advocate General sets aside the findings or sentence, he or she would be required to

either order a rehearing or dismiss the charges. In addition, where the Judge Advocate General sets aside the findings or sentence and orders a rehearing, if the convening authority determines that a rehearing would be impractical, the convening authority should dismiss the charges.

Under the related proposal for Article 64, summary courts-martial would still be reviewed under the procedures contained in that statute. General and special courts-martial reviewed under Article 65, as well as summary courts-martial reviewed under Article 64, would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra.* Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

Article 66 – Review by Court of Criminal Appeals
10 U.S.C. § 866

1. Summary of Proposal

This proposal would: (1) replace automatic review in non-capital cases with a filing procedure similar to the appeal as of right process used in the federal civilian appellate courts; (2) retain mandatory review in capital cases; (3) expand the opportunity for servicemembers to request review by the Courts of Criminal Appeals; (4) provide statutory standards for factual sufficiency review, sentence appropriateness review, and review of excessive post-trial delays; and (5) provide a statutory framework for cases involving remands and rehearings.

2. Summary of the Current Statute

Article 66 provides for the establishment of Courts of Criminal Appeals and provides the procedures for appellate review. Under Article 66(a)-(b), each Judge Advocate General is required to establish a Court of Criminal Appeals; to designate a chief judge for the court; and to refer to the court the record of each court-martial in which the sentence approved by the convening authority includes a punitive discharge, confinement for one year or more, or death. The statute also specifies court composition, and the court's authority to reconsider its decisions.

Under Article 66(c), the court may act only with respect to the findings and sentence approved by the convening authority, and may affirm only such findings and sentence as it finds correct in law and fact and which it determines, on the basis of the entire record, should be approved. In considering the record, the court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 66(d) authorizes the Court of Criminal Appeals to order a rehearing in cases where the court sets aside the findings and sentence, except in those cases where the court dismisses the findings of a court-martial due to either factual or legal insufficiency. If the Court of Criminal Appeals sets aside the findings and sentence but does not order a rehearing, the court must dismiss the charges. In those cases where the court has ordered a rehearing, the convening authority may decide that a rehearing is impractical and may dismiss the charges.

Article 66(e) and Article 66(f) authorize the Judge Advocates General to instruct convening authorities with respect to decisions of the Courts Criminal Appeals; to prescribe rules of procedure for the Courts of Criminal Appeals; and to meet periodically with the courts to formulate policies for review of courts-martial.

Article 66(g) and Article 66(h) prohibit members of a Court of Criminal Appeals from preparing, reviewing, or submitting in any way a performance review or other fitness review concerning the assignment or promotion or retention of another member of a Court of Criminal Appeals; and from reviewing the record in a trial if the member previously served as an investigating officer in the case or member of the court-martial or as judge, or trial or defense counsel in the case.

In addition to direct review under Article 66, the Courts of Criminal Appeals, as well as the Court of Appeals for the Armed Forces, may consider petitions for extraordinary relief under the All Writs Act, 28 U.S.C. §1651(a).[1]

3. Historical Background

Before Congress enacted the UCMJ in 1950, each military service operated under its own unique statutory authority, with limited appellate processes.[2] Following complaints against the military justice system during and after World War I, the Army developed a regulatory procedure for reviewing cases with significant punishments by a board of judge advocates.[3] In the 1920 Articles of War, Congress provided statutory authority for the Army's review process, requiring the Judge Advocate General of the Army to establish one or more Boards of Review to review specified types of cases.[4] Prior to the UCMJ's enactment, the Navy did not have Boards of Review.[5] In 1948, in the Elston Act, Congress authorized these Boards of Review to weigh the evidence in addition to determining matters of law, and to modify the findings and sentence when "deemed necessary to the ends of justice," even where the verdict was legally sufficient.[6]

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[1] *See, e.g.,* Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969); Clinton v. Goldsmith, 526 U.S. 529 (1999); United States v. Denedo , 556 U.S. 904 (2009); *see also* Article 6b(e) (petitions for writs of mandamus filed by a victim in with respect to M.R.E. 513 (the psychotherapist-patient privilege) and M.R.E. 412 (evidence regarding a victim's sexual background).

[2] The Army operated under the Articles of War and the Navy operated under Articles for the Government of the Navy. The Revenue-Cutter Service practice was governed by the Act to Regulate Enlistments and Punishments in the United States Revenue-Cutter Service of May 26, 1906, 34 Stat. 200, until consolidation with the U.S. Lifesaving Service to form the U.S. Coast Guard in 1915. Coast Guard review of cases was governed by the Part IX of the Courts and Boards Manual until the adoption of the UCMJ.

[3] *See* Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 32 (1967); William F. Fratcher, *Appellate Review in Military Law*, 14 MO. L. REV. 15, 40-43 (1949); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989). Although these Boards employed procedures similar to those of appellate courts, their opinions were not binding on the Judge Advocate General.

[4] *See* Act of June 4, 1920, ch. 2, 41 Stat. 759 (art. 50 1/2).

[5] *See, e.g.*, AGN 53 and 54 of 1930.

[6] Act of June 24, 1948, Pub. L. No. 80-759, ch. 625, tit. II, 62 Stat. 627, 635-37. These amendments were made in recognition that the "absence of this authority [to weigh the evidence in addition to determining matters of law] heretofore has been a common cause of criticism." H. REP. NO. 80-1034, at 7 (1948). In the Elston Act amendments, Congress also established a body above the board of review, known as the Judicial Council,

When Congress enacted the UCMJ in 1950, it established Boards of Review (now the Courts of Criminal Appeals) for all of the services, and provided the Boards with the power to issue decisions binding on the Judge Advocates General.[7] The UCMJ provisions reflected the prior Army practice of limiting the jurisdiction of the Boards of Review to cases with at least a set minimum punishment, designating certain cases for review at the unit level, and designating other cases for review in the Office of the Judge Advocate General. Accordingly, the Boards of Review automatically reviewed all cases in which the approved sentence included death, confinement for one year or more, a punitive separation, or affected a general or flag officer.[8] Such cases were subject to further review by the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces). The Judge Advocate General automatically reviewed all general courts-martial that were not reviewed by the Boards of Review. The Judge Advocate General could submit such cases to the Boards of Review, but they were not subject to further review by the Court of Military Appeals. The remaining cases—special courts-martial not involving a punitive discharge and summary courts-martial—were reviewed by judge advocates at the unit level.

4. Contemporary Practice

The President has implemented Article 66 through R.C.M. 1203. Pursuant to Article 66(f), the Judge Advocates General prescribed Uniform Rules of Procedure for the Courts of Criminal Appeals.[9] The scope of the Courts of Criminal Appeals' review authority is well-established on matters such as automatic review, errors of law, factual sufficiency and fact-finding, sentence appropriateness, and the Court's authority to affirm only such findings and sentence as it finds correct in law and fact, and which it determines, on the basis of the entire record, should be approved.[10]

5. Relationship to Federal Civilian Practice

Federal civilian appellate practice can be differentiated from military appellate practice primarily by: (1) the right of any person convicted of a criminal offense to appeal his or her

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composed of judge advocates at the general officer level, whose opinions also could be treated as advisory in nature by the Judge Advocate General. *See* Fratcher, *supra* note 3, at 62-67 (discussing the functions of the Judicial Council).

[7] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat 1335, 1341 (Courts of Military Review); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831 (1994) (Courts of Criminal Appeals.

[8] In the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, Congress eliminated automatic review of general and flag officer cases and authorized en banc reconsideration proceedings.

[9] Joint Courts of Criminal Appeals Rules of Practice and Procedure, 32 C.F.R. Part 150 (2014).

[10] Consider the Court of Appeals for the Armed Force's comprehensive analysis of Article 66(c) in *United States v. Nerad*, 69 M.J. 138 (2010).

conviction and sentence to a court of record; and (2) the lack of automatic appellate review, even in capital cases.[11]

Federal civilian defendants are entitled to "appeals as of right" from judgments or orders of a federal district courts,[12] and from misdemeanor convictions or sentences by a U.S. magistrate judges.[13] Appeals are required to be filed within 14 days of the entry of judgment or order by the district judge or the filing of the government's notice of appeal, whichever is later.[14] The notice of appeal must identify the judgment or final ruling that is being appealed.[15] The appellant also is required to file a brief which must contain, *inter alia*, "a statement of the issues presented," "a concise statement of the case setting out the facts relevant to the issues," and "argument, which must contain appellant's contentions and the reasons for them."[16] There is no requirement for the appellate court to look for errors not raised by the defendant, and federal courts regularly hold that a defendant forfeits claims of error not raised or not fully developed in their brief.[17] When appealing a criminal conviction, the record of trial consists generally of the original exhibits from trial and "the transcript of proceedings (if any)."[18]

Federal appellate courts do not perform a *de novo* review of the facts. Generally, federal courts review verdicts only for legal sufficiency.[19] However, federal civilian trial courts have the discretionary authority to order a retrial "in the interest of justice" if they conclude the verdict is so contrary to the "weight of the evidence" that a new trial is required.[20] With respect to sentence appeals, in federal civilian practice, both the defendant and the government have the right to appeal the sentence if "(1) imposed in violation of law; (2) imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than or less than the sentence specified in the applicable guideline

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[11] 18 U.S.C. 3595(a) (If "a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified[.]").

[12] 28 U.S.C. § 1291; FED. R. APP. P. 3 & 4(c) (providing for an appeal to the U.S. circuit court of appeals).

[13] *See* 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2) (providing for an appeal to a "judge of the district court of the district in which the offense was committed.").

[14] FED. R. APP. P. 4(b)(1)(A) (The time period for the government to appeal is 30 days).

[15] FED. R. APP. P. 3(c)(1). Generally, failure to file a timely notice of appeal is a jurisdictional bar.

[16] FED. R. APP. P. 28(a)(5-8). Generally, the appellate court will review only those issues specified by the appellant. *See, e.g*. C.A. May Marine Supply Co. v. Brunswick Corp., 649 R.2d 1049 (5th Cir. 1981).

[17] *See, e.g*, United States v. Clark, 469 F.3d 568, 569-70 (6th Cir. 2006).

[18] FED. R. APP. P. 10(a-b). Under the rule, it is the appellant's responsibility to obtain a copy of the transcript.

[19] Jackson v. Virginia, 443 U.S 307, 319 (1979) (The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

[20] FED. R. CRIM. P. 33(a); *see, e.g*., United States v. Chambers, 642 F.3d 588, 592 (7th Cir. 2011); United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002).

range [with additional caveats]; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."[21]

Every state jurisdiction provides some means of appellate review by a court for defendants in criminal cases. The intermediate appellate courts in New York exercise a scope of review over felony cases similar to that exercised by the Courts of Criminal Appeals in terms of authority to review cases for factual sufficiency and to determine whether a sentence is unduly harsh or severe.[22]

6. Recommendation and Justification

Recommendation 66.1: Amend Article 66 to establish an appeal as of right in non-capital cases similar to federal civilian appellate courts, and expand the opportunity for direct review by the Courts of Criminal Appeals of courts-martial convictions.

This proposal would retain automatic review of all cases that include a sentence determined by the members in a capital case including a sentence of death. The finality of the punishment, role of members in determining the sentence, and other unique procedural and substantive requirements of capital cases warrant no change in this area.

For non-capital cases that are subject to automatic review under current law, this proposal would require the accused to file an appeal in order to obtain direct review by the Courts of Criminal Appeals. This proposal would expand the opportunity for servicemembers to request review by the Courts of Criminal Appeals, through an appeal of right, in cases that are not now eligible for direct review at the request of the accused. Currently, direct review in non-capital cases is limited to cases in which the sentence includes confinement for a year or more or a punitive separation. Under this proposal, cases with a sentence that includes confinement for more than six months, or a punitive separation, would be eligible for direct appellate review. The opportunity to request direct appellate review also would be available to the accused in cases where the government appeals the sentence under proposed Article 56(p), or where the government has previously filed an interlocutory appeal under Article 62 in the same case. An additional opportunity to obtain review by the Courts of Criminal Appeals is addressed in the proposed revision to Article 69.[23]

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[21] 18 U.S.C.S. § 3742(a)-(b). Under the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 245 (2005), the Guidelines are treated as advisory.

[22] N.Y. CRIM. PROC. § 470.15 ("The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence."); People v. Romero, 7 N.Y.3d 633 (2006).

[23] Under the proposal for Article 69 (Review in the Office of the Judge Advocate General), servicemembers whose general, special, or summary courts-martial resulted in sentences of confinement for six months or less and who otherwise do not qualify for direct review under Article 66 would have a pathway to review by a Court of Criminal Appeals. Such accused would be required to file an application for review with the Court of Criminal Appeals and such review would be at the discretion of the court.

This proposal would preserve complete review of the record by appellate defense counsel in cases eligible for review under Article 66 and eliminate the requirement for automatic record review by Courts of Criminal Appeals. This proposal also would require the accused and appellate defense counsel to decide whether to appeal, and, if so, which issues to appeal. The courts would only review the record after the accused files an appeal, and then with the benefit of issues identified and briefed by counsel. The courts would retain the ability to specify issues for briefing, argument, and decision, and to review for plain error. Consistent with past military practice, military accused would continue to be represented by appellate defense counsel at no cost and without regard to the accused's ability to pay. In those cases where an accused chooses not to exercise an appeal, the decisions of the trial court would be subject to limited review under proposed amendments to Article 65.[24]

Recommendation 66.2: Amend Article 66 to provide statutory standards for factual sufficiency review, sentence appropriateness review, and review of excessive post-trial delay.

Current law requires the Court of Criminal Appeals to independently review every case for the factual sufficiency of every conviction. This proposal would require the accused to raise any factual sufficiency issues regarding the findings and would authorize the Courts of Criminal Appeals to dismiss a finding that it is clearly convinced is contrary to the weight of the evidence.

The proposal draws upon New York state practice, in a manner that reflects military practice since 1948.[25] Under this proposal: (1) the accused would be required to raise the issue and to make a specific showing of deficiencies in proof; and (2) the court could then set aside the finding if it is clearly convinced the finding was against the weight of the evidence. Although the court could weigh the evidence and determine controverted questions of fact, it would be required to give deference to the trial court on those matters. Similar to current practice, the court could affirm a lesser finding. If a finding is dismissed because the finding was against the weight of the evidence as a factual matter, retrial would be prohibited.

[24] See the related proposal for Article 65 (Disposition and Review of Records), in which limited review of the record would be conducted when the accused fails to timely file an appeal or waives or withdraws from appellate review.

[25] In New York, upon request of the defendant, the intermediate appellate court must conduct a weight of the evidence review. New York Criminal Procedure Law 470.15 [5]. This weight of evidence review is a two-step process: (1) the court must "determine whether an acquittal would not have been unreasonable"; and (2) "[i]f so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt." People v. Danielson, 9 N.Y.3d 342, 348 (2007) (citing People v Crum, 272 N.Y. 348 (1936)). If the appellate court concludes that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict. People v. Bleakley, 69 N.Y. 2d 490, 495; People v. Romero, 7 N.Y. 3d 633, 644 (N.Y.C.A. 2006).

The proposal would provide authority for sentence review under the standards set forth in the proposed amendments to Article 56. The standard for providing relief for excessive post-trial delay is contained in the proposed amendment to Article 66(d)(3).

Recommendation 66.3: Amend Article 66 to provide the Courts of Criminal Appeals with explicit authority to order a hearing, rehearing or remand for further proceedings as may be necessary to address a substantial issue.

This proposal would expressly provide the authority for the court to remand a case for additional proceedings as may be necessary to address a substantial issue. This proposal would incorporate current practice (i.e., "*Dubay*" hearings) and could include orders to either a convening authority or Chief Trial Judge for delegation to a military judge.[26] The procedure for such additional proceedings would be addressed in regulations prescribed by the President. Part II of this Report will address these procedures.

This proposal would generally comport with practice in the federal civilian courts.[27]

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by employing the standards and procedures applicable to appellate rights and practice in the civilian sector.

The elimination of automatic review by the Courts of Criminal Appeals in all but capital cases and the creation of an appeal of right system would better align with practice in the federal and state courts. The proposal has the potential for increasing the efficiency and effectiveness of the appellate process by focusing the courts on issues raised by the parties. Key to these benefits is the accused's right to assistance of qualified appellate defense counsel, at no cost, to include review of the record by appellate defense counsel in all cases with a sentence including a punitive discharge, confinement in excess of six months, or where the government has previously filed an interlocutory or sentence appeal.

[26] United States v. Dubay, 37 C.M.R. 411 (1967).

[27] *See* FED. R. APP. P. 12.1(a) ("If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue."); FED. R. APP. P. 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal[.]").

8. Legislative Proposal

SEC. 910. COURTS OF CRIMINAL APPEALS.

(a) APPELLATE MILITARY JUDGES.—Subsection (a) of section 866 of chapter 47 of title 10, United States Code (article 66 of the Uniform Code of Military Justice), is amended—

(1) in the second sentence, by striking "subsection (f)" and inserting "subsection (i)";

(2) in the fourth sentence, by inserting after "highest court of a State" the following: "and must be certified by the Judge Advocate General as qualified, by reason of education, training, experience, and judicial temperament, for duty as an appellate military judge"; and

(3) by adding at the end the following new sentence: "In accordance with regulations prescribed by the President, assignments of appellate military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(b) REVISION OF APPELLATE PROCEDURES.—Such section (article) is further amended—

(1) by redesignating subsections (e), (f), (g), and (h) as subsections (h), (i), (j), and (k), respectively; and

(2) by striking subsections (b), (c), and (d) and inserting the following new subsections:

"(b) REVIEW.—

"(1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction of a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c), as follows:

"(A) On appeal by the accused in a case in which the sentence extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for more than six months.

"(B) On appeal by the accused in a case in which the Government previously filed an appeal under sections 856(e) or 862 of this title (articles 56(e) or 62).

"(C) In a case in which the accused filed an application for review with the Court under section 869(d)(1)(B) of this title (article 69(d)(1)(B)) and the application has been granted by the Court.

"(2) REVIEW OF CAPITAL CASES.—A Court of Criminal Appeals shall have jurisdiction of a court-martial in which the judgment entered into the record under section 860c of this title (article 60c) includes a sentence of death.

"(c) TIMELINESS.—An appeal under subsection (b) is timely if it is filed as follows:

"(1) In the case of an appeal by the accused under subsection (b)(1)(A) or (b)(1)(B), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article 65(c)); or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(2) In the case of an appeal by the accused under subsection (b)(1)(C), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is notified that the application for review has been granted by letter placed in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record; or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(d) DUTIES.—

"(1) In any case before the Court of Criminal Appeals under paragraph (1) of subsection (b), the Court shall affirm, set aside, or modify the findings, sentence, or order appealed.

"(2) In any case before the Court of Criminal Appeals under paragraph (2) of subsection (b), the Court shall review the record of trial and affirm, set aside, or modify the findings or sentence.

"(3) In any case before the Court of Criminal Appeals under paragraph (1) or (2) of subsection (b), the Court may provide appropriate relief if the accused

demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c).

"(e) CONSIDERATION OF THE EVIDENCE.—

"(1) In an appeal of a finding of guilty under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court of Criminal Appeals, upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused. The Court may set aside and dismiss a finding if clearly convinced that the finding was against the weight of the evidence. The Court may affirm a lesser finding. A rehearing may not be ordered.

"(2) When considering a case under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court may weigh the evidence and determine controverted questions of fact, subject to—

"(A) appropriate deference to the fact that the court-martial saw and heard the witnesses and other evidence; and

"(B) appropriate deference to findings of fact entered into the record by the military judge.

"(f) CONSIDERATION OF SENTENCE.—(1) In considering a sentence on appeal, other than as provided in section 856(e) of this title (article 56(e)), the Court of Criminal Appeals may consider—

"(A) whether the sentence violates the law;

"(B) whether the sentence is inappropriately severe—

"(i) if the sentence is for an offense for which there is no sentencing parameter under section 856(d) of this title (article 56(d)); or

"(ii) in the case of an offense with a sentencing parameter under section 856(d) of this title (article 56(d)), if the sentence is above the upper range under subsection (d)(2)(B)(iii).

"(C) in the case of a sentence for an offense with a sentencing parameter under this section, whether the sentence is a result of an incorrect application of the parameter;

"(D) whether the sentence is plainly unreasonable; and

"(E) in review of a sentence to death or to life in prison without eligibility for parole determined by the members in a capital case under section 853(d) of this title (article 53(d)), whether the sentence is otherwise appropriate, under rules prescribed by the President.

"(2) In an appeal under this subsection or section 856(e) of this title (article 56(e)), other than review under subsection (b)(2), the record on appeal shall consist of—

"(A) any portion of the record in the case that is designated as pertinent by either of the parties;

"(B) the information submitted during the sentencing proceeding; and

"(C) any information required by rule or order of the Court of Criminal Appeals.

"(g) LIMITS OF AUTHORITY.—

"(1)(A) If the Court of Criminal Appeals sets aside the findings, the Court—

"(i) may affirm any lesser included offense; and

"(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

"(B) If the Court of Criminal Appeals orders a rehearing on a charge and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charge.

"(C) If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed.

"(2) If the Court of Criminal Appeals sets aside the sentence, the Court may—

"(A) modify the sentence to a lesser sentence; or

"(B) order a rehearing.

"(3) If the Court determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue, subject to such limitations as the Court may direct and under such regulations as the President may prescribe.".

(c) ACTION WHEN REHEARING IMPRACTICABLE AFTER REHEARING ORDER.—Subsection (h) of such section (article), as redesignated by subsection (b)(1), is amended—

(1) in the first sentence, by striking "convening authority" and inserting "appropriate authority"; and

(2) by striking the last sentence.

(d) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§866. Art. 66. Courts of Criminal Appeals.".

9. Sectional Analysis

Section 910 would amend Article 66 to revise the scope of review and enlarge the category of cases eligible for review by the Courts of Criminal Appeals under Article 66. Specifically, the proposed amendments would: (1) replace automatic review in non-capital cases with a filing procedure similar to the appeal as of right process used in the federal civilian appellate courts; (2) retain mandatory review in capital cases; (3) provide for discretionary review by the Courts of Criminal Appeals in cases that are not eligible for an appeal as of right; (4) provide standards of review for appeals; and (5) codify the authority of Courts of Criminal Appeals to remand cases and order rehearings. As amended, Article 66 would contain the following provisions:

Article 66(a) would require the President to establish minimum tour lengths, with appropriate exceptions, for appellate military judges, and would require the Judge Advocate General of each service to certify the qualifications of appellate military judges consistent with the proposed amendment to Article 26 regarding the assignment and qualifications of military judges. *See* Section 504(b), *supra.* Implementing rules will reflect the Services' role and discretion in applying exceptions to the minimum tour lengths.

Article 66(b) would expand the categories of cases in which servicemembers may seek direct review by the Courts of Criminal Appeals. It would replace automatic review in non-capital cases with an appeal of right. It also would continue to require automatic review of all capital cases. The amendments would provide every servicemember found guilty of an offense by a court-martial with a pathway to review by a court of record. As amended, there would be two prerequisites for review of non-capital cases by the Courts of Criminal

Appeals under Article 66(b): (1) entry of the court-martial judgment into the record by a military judge under proposed Article 60c; and (2) timely filing of an appeal. The Court of Criminal Appeals would be able to review: (1) any case with a sentence to a punitive separation or confinement of more than six months; (2) any case that was previously the subject of an appeal by the United States under Article 62 or Article 56; and (3) any other case in which an application for discretionary review under Article 69(e)(2) was granted. For purposes of this subsection, the term "confinement for more than six months" would mean the total period of confinement adjudged, but would not aggregate periods of confinement running concurrently.

Article 66(c) prescribes jurisdictional timelines for appellate review by the Courts of Criminal Appeals.

Article 66(d) defines the duties of the Courts of Criminal Appeals, which would be consistent with current practice except that the obligation to review every case for factual sufficiency and sentence appropriateness would be eliminated. Under paragraph (3), the Courts of Criminal Appeals could provide relief for post-trial errors and excessive post-trial delay.

Article 66(e) details the limited authorities of the Courts of Criminal Appeals to weigh and consider evidence. The Court's authority to set aside a finding that is contrary to the weight of the evidence would be retained, but would require the accused to identify deficiencies in the proof and would allow the Court to set aside such findings only if "clearly convinced that the finding was against the weight of the evidence." This would channel the exercise of such authority through standards that are more deferential to the factfinder at trial and more reviewable by higher courts.

Article 66(e)(2) would address consideration of the entire case, including a finding of guilty and the sentence. The Court's authority to weigh the evidence and to determine controverted questions of fact would be retained, but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial. This change would enable application of differing standards of review tailored to widely varied matters, including rulings on pretrial motions, the findings and sentence adjudged by the court-martial, and sentences of death determined by members.

Article 66(f) would provide standards of review applicable to sentences adjudged both before and after sentencing parameters are implemented under the proposed amendments to Article 56. *See* Section 801, *supra.* The proposed standards of review would provide the accused with several avenues to appeal a court-martial sentence. First, the accused would be able to appeal a sentence that was unlawful, or that resulted from incorrect application of a sentencing parameter. Second, consistent with the government's ability to appeal a sentence under Article 56(e) (as amended) the accused could appeal a sentence on the grounds that it is plainly unreasonable. *See* Section 801, *supra.* The term "plainly unreasonable" is taken from 18 U.S.C. § 3742 and is intended to provide substantial deference to the trial judge. Third, in cases where an adjudged offense has no sentencing

parameter, or where the sentence imposed was above the applicable sentencing parameter for the offense, the accused would be able to appeal the sentence as inappropriately severe. This provision recognizes that a sentence may be "inappropriately severe" despite being reasonable. Finally, in the case of a sentence determined by a panel in a capital case, consistent with current practice, the Court would be required to determine whether the sentence is appropriate.

Article 66(g)(3) would codify the authority of Courts of Criminal Appeals to remand a case for additional proceedings as may be necessary to address substantial issues. This authority would be subject to any limitations the Court may direct or the President may prescribe by regulation. This provision would codify current practice (i.e., *DuBay* Hearings). *See United States v. Dubay*, 37 C.M.R. 411 (1967).

In addition to the authority to review specific types of cases designated in Article 66, the Courts of Criminal Appeals consider interlocutory appeals under Article 62 and petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g.*, *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Denedo*, 556 U.S. 904 (2009). The Courts of Criminal Appeals also review cases sent to the Court by the Judge Advocate General under Article 69. Under the proposed amendments to Article 56, the Courts of Criminal Appeals also would review sentence appeals filed by the Government under Article 56(e). The procedures applicable to proceedings arising under Article 56, like the procedures applicable to proceedings arising under Article 62, Article 69, and the All Writs Act, may be set forth in the rules for the Courts of Criminal Appeals prescribed under Article 66.

Article 67 – Review by the Court of Appeals for the Armed Forces
10 U.S.C. § 867

1. Summary of Proposal

This proposal would make a conforming change to Article 67 to align the statute with the creation of an "entry of judgment" in Article 60c and related amendments to Articles 60 and 66. In addition, this proposal would provide for notification to the Judge Advocates General in connection with a decision to certify a case for review by the Court of Appeals for the Armed Forces.

2. Summary of the Current Statute

Article 67 authorizes review in the Court of Appeals for the Armed Forces of cases from the Courts of Criminal Appeals. Review is mandatory in capital cases and in cases certified by one of the Judge Advocates General. Review is discretionary on petition by the accused upon a showing of good cause. The Court's review is limited to questions of law.[1]

3. Historical Background

Under the Articles of War, review of courts-martial relied primarily on review by commanders in the field and senior civilian officials, with judicial review by civilian courts limited to a narrow class of cases subject to collateral review through procedures such as habeas corpus.[2] When the UCMJ was enacted in 1950,[3] Congress established the Court of Military Appeals to provide for review by a civilian appellate court with judges appointed by the President, subject to Senate confirmation.[4] The Report of the House Armed Services Committee accompanying the legislation emphasized that the new court would be "completely removed from all military influence of persuasion."[5] The Military Justice Act of 1983 authorized direct Supreme Court review of decisions by the Court.[6] Congress revised

[1] 10 U.S.C. § 867(c); *see also* United States v. Leak, 61 M.J. 234, 239 (C.A.A.F. 2005).

[2] See Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 6 (1985).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1187-95 (1949).

[5] H.R. REP. No. 81–491, at 7 (1949).

[6] *See* Article 67a, UCMJ (designating the class of cases subject to review by the Supreme Court by writ of certiorari).

Article 67 in 1989 to provide for a five-judge court and revised statutes governing the court's organization and administration.[7] The legislation transferred the provisions concerning organization and administration of the Court to Articles 141 through 146.[8] In 1994, Congress renamed the Court the U.S. Court of Appeals for the Armed Forces.[9]

4. Contemporary Practice

The Court of Appeals for the Armed Forces considers appeals from decisions of the Courts of Criminal Appeals, including decisions that address the approved findings and sentence of a court-martial, interlocutory appeals, and writ appeals.[10] The Court of Appeals for the Armed Forces also considers original petitions for extraordinary writs.[11]

5. Relationship to Federal Civilian Practice

In the Article III civilian courts, both the government and the defendant have the right to appeal a judgment or an order of a federal district court to a circuit court of appeals.[12] Except in capital and certified cases, the Court of Appeals for the Armed Forces has discretion to accept or decline review.

6. Recommendation and Justification

Recommendation 67.1: Provide conforming changes to Article 67(c) to align the provision with proposed creation of an "entry of judgment" in Article 60c and related amendments to Articles 60 and 66.

This is a conforming change. The proposal would not expand or otherwise alter the jurisdiction of the Court of Appeals for the Armed Forces.

Recommendation 67.2: Amend Article 67 by adding a notification requirement to the certification process under Article 67(a)(2).

The addition of a notification requirement to the certification process under Article 67(a)(2) is designed to ensure that each of the Judge Advocates General has a meaningful opportunity to share views on any proposed certification of an issue before the certification is filed with the Court of Appeals for the Armed Forces.

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[7] NDAA FY 1990-91, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989). The 1989 amendments transferred the provisions governing the organization and administration of the Court to Articles 141-146. *See* H.R. REP. NO. 101-331, at 657 (1989) (Conf. Rep.).

[8] NDAA FY 1990-1991, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989).

[9] Codified as amended at 10 U.S.C. §§ 867, 941-946 (re-designating the U.S. Court of Military Appeals as the U.S. Court of Appeals for the Armed Forces).

[10] *See* USCAAF Rule 18(a) (citing Articles 62, 66, and 28 U.S.C. § 1651(a)).

[11] *See* USCAAF Rule 4(b)(1) and 18(b) (citing 28 U.S.C. § 1651(a)).

[12] 28 U.S.C. § 1291; FED. R. APP. P. 3; FED. R. APP. P. 4(b).

The proposed change would not limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces. It is intended to ensure that each Judge Advocate General has an opportunity to provide input on the decision to appeal cases that have the potential for impacting the law that affects all the services.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal supports MJRG Operational Guidance by enhancing efficiency during the appellate phase of the court-martial process.

8. Legislative Proposal

SEC. 911. REVIEW BY COURT OF APPEALS FOR THE ARMED FORCES.

(a) JAG NOTIFICATION.—Subsection (a)(2) of section 867 of title 10, United States Code (article 67 of the Uniform Code of Military Justice), is amended by inserting after "the Judge Advocate General" the following: ", after appropriate notification to the other Judge Advocates General,".

(b) BASIS FOR REVIEW.—Subsection (c) of such section (article) is amended—

(1) by inserting "(1)" after "(c)";

(2) by designating the second sentence as paragraph (2);

(3) by designating the third sentence as paragraph (3);

(4) by designating the fourth sentence as paragraph (4); and

(5) in paragraph (1), as designated by paragraph (1) of this subsection, by striking "only with respect to" and all that follows through the end of the sentence and inserting the following:

"only with respect to—

"(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

"(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.".

9. Sectional Analysis

Section 911 would amend Article 67, which sets forth the procedures for the Court of Appeals for the Armed Forces to review cases from the Courts of Criminal Appeals, to conform the statute to proposed changes in Articles 60 and 66, including the creation of an "entry of judgment" in the proposed Article 60c (Entry of judgment). *See* Sections 901-904, 910, *supra.* In addition, the amendments would provide for notification by a Judge Advocate General to the other Judge Advocates General prior to certifying a case for review by the Court of Appeals for the Armed Forces. The recommendation for "appropriate notification to the other Judge Advocates General" would apply only to cases the Judge Advocate General intends to certify to the Court of Appeals for the Armed Forces pursuant to Article 67(a)(2). This change is intended to ensure that each Judge Advocate General has an opportunity to provide meaningful input on the decision to appeal cases that have the potential to impact the law applicable to all the services. The change would not alter the jurisdiction of the Court of Appeals for the Armed Forces over these cases nor would it limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces.

Article 67a – Review by the Supreme Court
10 U.S.C. § 867a

1. Summary of Proposal

This proposal would make a technical amendment to Article 67a.

2. Summary of the Current Statute

Article 67a specifies that decisions of the Court of Appeals for the Armed Forces are subject to review at the U.S. Supreme Court by a writ of certiorari, except in cases where the Court of Appeals for the Armed Forces has refused to grant a petition for review. For cases subject to Supreme Court review under the statute, the accused is not required to submit an affidavit demonstrating indigency as a precondition to filing a petition for a writ of certiorari without prepayment of fees and costs.

3. Historical Background

Prior to the enactment of the Military Justice Act of 1983, decisions of the Court of Military Appeals (now the Court of Appeals for the Armed Forces) were not subject to direct review by the Supreme Court.[1] In a limited number of cases, the accused could seek collateral review through an extraordinary writ, but the government had no opportunity of review.[2] The Military Justice Act of 1983 provided the first avenue of direct review by the Supreme Court.[3] This review was limited to cases that the Court of Military Appeals had itself already reviewed, or for which the court had otherwise granted relief.[4] This limitation was placed in the statute out of concern about the volume of cases from the military justice system that might be the subject of petitions for review.[5]

4. Contemporary Practice

The President has implemented Article 67a through R.C.M. 1205, which tracks the statutory provisions closely. All capital cases under the UCMJ are eligible for Supreme Court review.[6] The government can ensure the eligibility of any case in which it has an

[1] *See* H.R. REP. 98-549, at 16 (1983).

[2] *See id*.

[3] Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393.

[4] *See* H.R. REP. 98-549 at 10, 13 (1983); *see also* 28 U.S.C. § 1259.

[5] *See* H.R. REP. 98-549 at 16-17 ("In view of current concerns about the Supreme Court's Docket, the Legislation has been drafted in a manner that will limit the number of cases subject to direct review.").

[6] 28 U.S.C. § 1259(1) (2015).

interest by certifying the case to the Court of Appeals for the Armed Forces. Any such certified case must be decided by the Court of Appeals, and any case in which the government does not prevail is eligible for review.[7] Legislation to provide servicemembers with a similar degree of access to the Supreme Court has been introduced but not enacted.[8] Since enactment of the Military Justice Act of 1983, the number of petitions for certiorari filed in the Supreme Court seeking review of courts-martial has turned out to be lower than expected. Even in those cases eligible for Supreme Court review, petitions to the Supreme Court have been filed in only a fraction of the cases.[9]

5. Relationship to Federal Civilian Practice

Every federal criminal case is eligible for Supreme Court review at the request of either the government or the defense. Every state criminal case is eligible for Supreme Court review of federal issues at the request of either the government or the defense. Every trial of an alien unprivileged enemy belligerent before military commission is eligible for Supreme Court review at the request of the government or the accused.[10] In contrast, a court-martial is not eligible for Supreme Court review unless it is a capital case, a case certified by the Judge Advocate General, or a case in which the Court of Appeals for the Armed Forces grants review or otherwise grants relief.

6. Recommendation and Justification

Recommendation 67a: Consult all three branches of government regarding enhanced access by members of the armed forces to review by the Supreme Court.

The issue of whether servicemembers should be provided with the same level of access to the Supreme Court available to defendants in federal and state criminal proceedings, as well as in military commissions, is a matter that requires consultation among the legislative, executive, and judicial branches of government. Pending such consultation, the proposal includes a technical amendment to Article 67a (setting forth the full name of the United States Court of Appeals for the Armed Forces).

7. Relationship to Objectives and Related Provisions

The proposed amendments to Articles 60-67 endeavor to align more closely appellate review within the military justice system with the scope of review generally available to litigants throughout the American legal system. Consultation among the three branches of

[7] 28 U.S.C. § 1259(2)-(4) (2015).

[8] *See, e.g.*, Equal Justice for Our Military Act of 2013, H.R. 1435, 113th Cong., 1st Sess. (2013).

[9] On average over the past five years, fewer than a dozen petitions per year have been filed with the Supreme Court for review under Article 67a according to data compiled by the U.S. Court of Appeals for the Armed Forces.

[10] 10 U.S.C. § 950g (2015).

government will provide an opportunity to consider whether similar changes are needed in the access of accused servicemembers to direct review by the Supreme Court.

8. Legislative Proposal

SEC. 912. SUPREME COURT REVIEW.

The second sentence of subsection (a) of section 867a of title 10, United States Code (article 67a of the Uniform Code of Military Justice), is amended by inserting before "Court of Appeals" the following: "United States".

9. Sectional Analysis

Section 912 would make a technical amendment to Article 67a.

Article 68 – Branch Offices
10 U.S.C. § 868

1. Summary of Proposal

This Report recommends no change to Article 68. Part II of the Report will consider whether any changes are needed in the rules implementing Article 68.

2. Summary of the Current Statute

Article 68 authorizes the Service Secretary to direct the Judge Advocate General to establish branch offices within any command.

3. Historical Background

Article 68 was modeled after Article 50(c) of the Articles of War.[1] As enacted, Article 68 required Presidential direction to establish a branch office with a "distant command."[2] In 1968, the statute was amended to substitute the Service Secretary for the President, and removed the limitation that branch offices could be established only in a "distant command."[3] In 1994, Article 68 was amended to substitute "Court of Criminal Appeals" for "Court of Military Review."[4]

4. Contemporary Practice

No service currently has a branch office established pursuant to Article 68. Advances in electronic communication have made the possibility of establishing branch offices less likely.

5. Relationship to Federal Civilian Practice

In federal civilian practice, the U.S. Courts of Appeals are established by statute. Except for the Court of Appeals for the Federal Circuit, the courts of appeals are geographically located within their jurisdiction.

6. Recommendation and Justification

Recommendation 68: No change to Article 68.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1195 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] Military Justice Act of 1968, Pub. L. No. 90-632, § 2(29), 82 Stat. 1342 (1968).

[4] NDAA FY 1995, Pub. L. No. 103-337, Div. A, Title IX, § 924(c)(2), 108 Stat. 2831 (1994).

Article 68 allows for efficient appellate review during times of mass mobilization and geographic isolation. While the current force structure and advances in electronic communication have lessened the importance of Article 68, it continues to serve a purpose in ensuring that the UCMJ remains flexible enough to account for all future environments.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 69 – Review in the Office of the Judge Advocate General
10 U.S.C § 869

1. Summary of Proposal

The proposal would align the procedures for review in the Office of the Judge Advocate General under Article 69 with the proposed revisions in the appellate process under Article 66 (Review by Court of Criminal Appeals), and with the related revisions in the review process under Articles 64 (Review by a judge advocate) and 65 (Disposition of records). The proposal also would provide servicemembers with an opportunity to apply to the applicable Court of Criminal Appeals for judicial review of decisions made under Article 69. Part II of the Report will address changes in the rules implementing Article 69 provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 69 authorizes the Judge Advocate General of each service to review courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66. Article 69 provides two forms of review. The first form of review, set forth in Article 69(a), is automatic and applies to those general courts-martial in which the sentence does not include a punitive discharge, confinement for 12 months or more, or capital punishment—unless, pursuant to Article 61 (waiver or withdrawal of appeal), the accused has waived or withdrawn the right to Article 69(a) review. If, during the Article 69(a) review, the Judge Advocate General determines that any part of the findings or sentence is unsupported in law or that sentence reassessment is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.

The second form of review, set forth in Article 69(b), applies to any case that did not receive direct review in the Office of the Judge Advocate General under Article 69(a) or in a Court of Criminal Appeals under Article 66. In general, these cases are summary and special courts-martials that were reviewed under Article 64, as well as any case where the accused waived or withdrew appeal under Article 61. In such cases, the findings, the sentence, or both may be modified or set aside on the basis of newly discovered evidence, fraud on the court, lack of jurisdiction, prejudicial error, or sentence appropriateness. If not automatically forwarded as part of the review under Article 64, an accused must apply for this review within two years after the convening authority approves the results of trial under Article 60; an extension may be granted when the accused shows good cause for the failure to file within the two-year period.

Article 69(c) provides that, under both forms of Article 69 review, the power of the Judge Advocate General to modify or set aside the sentence includes the power to order a rehearing or dismiss charges in specified circumstances. Decisions by the Judge Advocate General under Article 69(a)-(b) may be reviewed by the Courts of Criminal Appeals only

upon certification by the Judge Advocate General. In such cases, appellate review is limited to matters of law.

3. Historical Background

When the UCMJ was enacted in 1950,[1] Congress adapted the review process for courts-martial from the review system under the Articles of War.[2] Article 69 initially was limited to review of general courts-martial. The Judge Advocate General automatically reviewed all general courts-martial that did not receive automatic review by the boards of review.[3] At that time, the Judge Advocate General was authorized to certify issues to the then Courts of Military Review, because "even minor cases may involve major differences of interpretation of the law."[4] The remaining cases—special courts-martial not involving a punitive discharge and summary courts-martial—were reviewed in the field.

The Military Justice Act of 1968 expanded the review authority of the Judge Advocate General to include special and summary courts-martial.[5] In addition, the legislation authorized the Judge Advocate General to vacate or modify the findings or sentence in any court-martial case which had been finally reviewed, but which had not been reviewed by a court of military review, because of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.[6] In 1981, Congress imposed a two-year limit on the statutory right to apply for Article 69 relief, unless the accused established good cause for failure to file within that time.[7] The legislative history of the 1981 amendment reflects a desire to limit the time for application of review in order to bring finality to these courts-martial.[8] The two-year time limit was adopted because that was the same limit applicable to a petition for a new trial

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1196 (1949).

[3] *Id.*

[4] United States v. Monett, 36 C.M.R. 335, 336-337 (C.M.A. 1966) (citing S. REP. NO. 81-486, 30 (1949)).

[5] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[6] *Military Justice: Joint Hearings before the Subcomm. on Constitutional Rights of the Senate Subcomm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 87th Cong. 553 (1966) (Part 1) (Testimony of Eugene N. Zuckert, Dep't of the Air Force before the Chairman, Senate Committee on Armed Services). This amendment was considered in concert with the amendment to extend the time for submitting a petition for a new trial under Article 73. One service representative testified that "it would be preferable to authorize the Judge Advocate General to take direct corrective action on these additional cases, rather than to limit his authority to granting a new trial." *Id.*

[7] Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat 1085.

[8] H.R. REP. NO. 97-306, at 8 (1981).

under Article 73.[9] The Military Justice Act of 1983 further amended the text of Article 69 to include Articles 69(a)-(c).[10]

In 1989, Congress established procedures for the Judge Advocates General to certify cases to the Courts of Criminal Appeals that were not otherwise subject to automatic review under Article 66.[11] The authority of the appellate courts under such cases is limited to "matters of law."[12]

4. Contemporary Practice

The President has implemented Article 69 through R.C.M. 1201(b). Under current law, the accused cannot obtain judicial review of an Article 69 decision within the military justice system unless the case is certified to the Court of Criminal Appeals by the Judge Advocate General.

5. Relationship to Federal Civilian Practice

Article 69 has no direct federal counterpart. In the federal civilian system, offenses punishable by confinement for one year or less are classified as misdemeanors, and, subject to limitations, may be tried in U.S. magistrate court or federal district court.[13] A defendant in federal court is entitled to an "appeal as of right" from a misdemeanor conviction, sentence, judgment or order of a U.S. magistrate judge to "a judge of the district court of the district in which the offense was committed."[14] A federal civilian defendant is also entitled to an "appeal as of right" from a judgment or order of a federal district court to a circuit court of appeals.[15] Although there is no express provision for an appeal of right from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed as a matter of course.[16] In an appeal from a magistrate court to a district court, the

[9] *Id*.

[10] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

[11] NDAA FY 1990 and 1991, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989); *see also* H.R. REP. No. 101-331, at 977, 1115 (1989) (Conf. Rep.).

[12] *Id*.

[13] *See* 18 U.S.C. § 3559 (Sentencing classification of offenses).

[14] *See* 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2).

[15] 28 U.S.C. § 1291; FED. R. APP. P. 3 & 4.

[16] *See, e.g.*, United States v. Apel, 134 S. Ct. 1144 (2014) (reviewing an appeal of a conviction by a U.S. magistrate judge); United States v. Forcellati, 610 F.2d 25, 28 (1st Cir. 1979) ("While there is thus no express provision for even the defendant to appeal from a judgment of the district court affirming a magistrate's conviction, such appeals have been allowed apparently as a matter of course . . . . The statutory grant to the courts of appeals of jurisdiction to review 'all final decisions' of district courts is literally sufficient to include final decisions reviewing criminal convictions before magistrates, and no reason for excluding them from its embrace appears. Indeed, the assurance of that further review in the courts of appeals encourages use of magistrates' trials for minor offenses.") (citing 28 USCS § 1291).

"defendant is not entitled to trial *de novo* by a district judge [and] [t]he scope of appeal shall be the same as an appeal from a judgment of a district court to a court of appeals."[17] Every state provides some means of appellate review by a court for defendants in criminal cases, including review of misdemeanors. "In misdemeanor cases, defendants commonly have a right of review in the general trial court (in some states, by trial *de novo*) with subsequent discretionary appellate review."[18]

6. Recommendation and Justification

Recommendation 69: Amend Article 69 to provide the accused with an opportunity to apply for review by a court of criminal appeals.

Article 69 provides servicemembers with an opportunity to obtain corrective action in cases that do not qualify for appellate review in a judicial forum before the Courts of Criminal Appeals. Under current law, an accused cannot obtain judicial review of Article 69 decisions unless the case is certified to the Court of Criminal Appeals by the Judge Advocate General.

This proposal would provide access to judicial review for servicemembers whose general, special, or summary courts-martial resulted in sentences of confinement for six months or less upon application by the accused. Such access would be at the discretion of the Court of Criminal Appeals following completion of review in the Office of the Judge Advocate General and would run in parallel with the Judge Advocate General's discretionary authority to send such cases to the Court of Criminal Appeals for review.

This proposal would more closely align appellate review of minor offenses with the practice in the state and federal civilian courts. Under the proposal, appellate review would be akin to the review process for a defendant convicted in federal magistrate court with a right of appeal to a district court, and with the additional right to appeal the district court's decision to a circuit court of appeals.

The proposed amendments would improve the appellate process by providing an accused who believes that his case includes legal error with an opportunity to apply directly to a court for appellate review.

Consistent with the proposed revision of Article 66 to require the filing of an appeal with the Court of Criminal Appeals in more serious cases with punishments including a punitive discharge or confinement for more than six months, this proposal would eliminate automatic review of general courts-martial under Article 69. Instead, the proposed change to Article 69 would require an accused to request review by a Judge Advocate General. This proposal would preserve the authority of the Judge Advocate General to take direct corrective action in those cases reviewable under Article 69.

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[17] FED. R. CRIM. P. 58(g)(2)(D).

[18] Westlaw Appeals (2014), § 27.1(a) at 3.

In the related proposals to amend Articles 64 and 65, this Report recommends that all general and special courts-martial not reviewed under Article 66 first should be reviewed automatically under Article 65, and that all summary courts-martial should continue to be first reviewed under Article 64. Then, an accused who is dissatisfied with the results of the Article 64 or Article 65 review would have one year to request further review under Article 69. However, if an accused can show good cause for a failure to file within one year, the Judge Advocate General can consider the application so long as it is filed within a three year period, which is consistent with the time limit for a petition for new trial under Article 73. After the Article 69 review is complete, the accused will have an additional 60 days to apply for review at the Court of Criminal Appeals. The Court of Criminal Appeals would have discretion to grant or deny the application for review if the accused demonstrates a "substantial basis for concluding that the action on review [by the Judge Advocate General] constituted prejudicial error." The Courts of Criminal Appeals' authority to take action on such cases would be limited to matters of law, reflecting the current standard under Article 69(e).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by ensuring that the court-martial process appropriately balances the limitation of rights available to members of the armed forces generally with procedures designed to ensure protection of rights that are provided under military law.

8. Legislative Proposal

SEC. 913. REVIEW BY JUDGE ADVOCATE GENERAL.

Section 869 of title 10, United States Code (article 69 of the Uniform Code of Military Justice), is amended to read as follows:

"§869. Art. 69. Review by Judge Advocate General

"(a) IN GENERAL.—Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

"(b) TIMING.—To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than one year after the

date of completion of review under section 864 or 865 of this title (article 64 or 65), as the case may be. The Judge Advocate General may, for good cause shown, extend the period for submission of an application, but may not consider an application submitted more than three years after such completion date.

"(c) SCOPE.—(1)(A) In a case reviewed under section 864 or section 865(d) of this title (article 64 or 65(d)), the Judge Advocate General may set aside the findings or sentence, in whole or in part on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

"(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (Article 44).

"(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

"(2) In a case reviewed under section 865(d) of this title (article 65(d)), review under this section is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law. If the Judge Advocate General

determines that the waiver, withdrawal, or failure to file an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

"(d) COURT OF CRIMINAL APPEALS.—(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)—

"(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

"(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

"(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if—

"(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

"(B) the application is filed not later than the earlier of—

"(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

"(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has

been provided by the accused, at the latest address listed for the accused in his official service record.

"(3) The submission of an application for review under this subsection does not constitute a proceeding before the Court of Criminal Appeals for purposes of section 870(c)(1) of this title (article 70(c)(1)).

"(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.".

9. Sectional Analysis

Section 913 would amend Article 69 to more closely align appellate review of minor offenses with the practice in the federal civilian courts. Presently, Article 69 authorizes the Judge Advocate General to conduct a post-final review of courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66 and that were not previously reviewed under Article 69. As amended, the accused would have a one-year period in which to file for review under Article 69 in the Office of the Judge Advocate General, extendable to three years for good cause. The three-year upper limit for filing is consistent with the proposed amendments to Article 73 (Petition for a new trial) to allow an accused to petition for a new trial based on newly discovered evidence or fraud on the court. *See* Section 916, *supra.* A review under Article 69, as amended, could consider issues of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The statute would permit the accused, after a decision is issued by the Office of the Judge Advocate General, to apply for discretionary review by the Court of Criminal Appeals under Article 66. The Judge Advocate General's authority to certify cases for review at the appellate courts would be retained.

Article 70 – Appellate Counsel
10 U.S.C. § 870

1. Summary of Proposal

This proposal would amend Article 70 by requiring to the greatest extent practicable that, in appeals of courts-martial in which the death penalty has been adjudged, at least one appellate defense counsel representing an accused must be learned in the law applicable to capital cases.

2. Summary of the Current Statute

Article 70 requires that appellate government counsel represent the government before the Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and, when requested by the Attorney General, before the Supreme Court. The statute also requires that appellate defense counsel represent the accused before those appellate courts when requested by the accused, or when counsel represents the government. Article 70(d) establishes the right of the accused to provide for his or her own representation by civilian counsel in these same appellate courts. Article 70(e) provides that the Judge Advocates General may direct military appellate counsel to perform other functions in connection with review of courts-martial.

3. Historical Background

Article 70 was included in the UCMJ as enacted in 1950 to provide for representation of the parties in conjunction with the establishment of the Boards of Review and the Court of Military Appeals (now Court of Appeals for the Armed Forces) as appellate courts within the military justice system.[1] The statute reflected a congressional desire to create a centralized group of appellate defense attorneys within the office of the Judge Advocate General.[2] Amendments in the Military Justice Act of 1983 expanded the responsibility of appellate counsel to represent the government and the accused before the Supreme Court under certain circumstances in conjunction with the enactment of authority for direct appellate review by the Supreme Court.[3] Subsequent amendments consisted of conforming changes to the legislation renaming the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces.[4]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1197-98 (1949).

[2] *See id.* at 1197-98.

[3] Military Justice Act of 1983, Pub. L. No. 98-209, § 10(c)(3), 97 Stat. 1393.

[4] NDAA FY 1995, Pub. L. No. 103-337, §924, 108 Stat. 2831-32 (1994).

4. Contemporary Practice

The President has implemented Article 70 through R.C.M. 1202, which largely repeats the statutory provisions. Under Article 70 and R.C.M. 1202, an accused has the right to effective representation by counsel when a case will be reviewed by a Court of Criminal Appeals, and, in appropriate cases, at the U.S. Court of Appeals for the Armed Forces under Article 67.[5] The rights under Article 70 are limited to the appellate level.[6] There is no right for the accused to be represented by trial defense counsel on appeal, nor is there a right to representation by appellate counsel at a later rehearing.[7]

Article 70 and Article 27(b) both address the qualifications of appellate defense counsel, and specify that counsel must be a judge advocate who is a graduate of an accredited law school or a member of the bar of a federal court or of the highest court of a state, and certified as competent to perform duties by the Judge Advocate General. In military death penalty cases, no unique qualifying criteria are imposed on defense counsel at trial or on appeal, other than the competency standards applicable in all cases.[8]

5. Relationship to Federal Civilian Practice

The Sixth Amendment right to counsel applies to all criminal defendants, with the state required to provide counsel to an indigent defendant.[9] The Supreme Court extended the right to counsel to the first appeal granted by state law as a matter of right,[10] and at other "critical" stages of the criminal proceedings.[11] Once a state grants a defendant the right of appeal, it cannot condition that right in a manner that violates the constitutional guarantee of equal protection. Although the Constitution does not require a state to provide an indigent with counsel when seeking a second-level, discretionary review, as a matter of practice, the Supreme Court and the state high courts appoint counsel once review has been granted.[12] State and federal public defenders usually continue their representation to

[5] Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 37 (C.A.A.F. 2003).

[6] United States v. Kelker, 4 M.J. 323, 325 (C.M.A. 1978).

[7] United States v. Martin, 4 M.J. 852, 855 (A.C.M.R. 1978).

[8] United States v. Curtis, 44 M.J. 106, 126 (C.A.A.F. 1996).

[9] Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending 6th Amendment right to counsel to misdemeanor cases subject to imprisonment).

[10] Douglas v. California, 372 U.S. 353 (1963) (addressing only appeals granted as a matter of right from a criminal conviction, not discretionary review).

[11] Hamilton v. Alabama, 368 U.S. 52 (1963) (extended the right to counsel to arraignment); Mempa v. Rhay, 389 U.S. 128 (1967) (appointment of counsel for an indigent is required at every state of a criminal proceeding where substantial rights of a criminal accused may be affected, in this case a sentencing hearing after the defendant had been placed on probation).

[12] WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 11.1(b) (3d ed. 2013).

include the certiorari petition when warranted.[13] State laws vary with respect to the appointment of counsel for second-tier, discretionary review.[14] With respect to collateral attacks on a conviction under state post-conviction relief procedures, the Supreme Court has held that the Constitution does not require the state to supply a lawyer.[15] However, by statute, Congress has provided for the appointment of counsel for indigents seeking collateral relief in federal court, including the Criminal Justice Act, 18 U.S.C. § 3006(a), and Rules 6 and 8 of the Rules Governing §2254 and §2255 proceedings.[16]

The civilian criminal justice system and the Military Commissions Act of 2009 both require unique qualifications for appellate defense counsel in capital cases, commonly referred to as "learned counsel." Federal law requires that, in a capital case in federal court, the defendant is entitled to at least two attorneys, one of whom "shall be learned in the law applicable to capital cases."[17] The Military Commissions Act also provides that a defendant is entitled to be represented "to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense . . . ."[18] The supporting regulations for the Military Commissions Act extend this obligation through appellate review. The "Regulation for Trial by Military Commission" provides:

> The Chief Defense Counsel shall establish . . . a section dedicated to providing appellate representation for the accused on appeal, to include appellate representation by counsel learned in the law applicable to capital cases for cases in which the appellant has been sentenced to death, and shall establish procedures for the appointment of appellate counsel to represent an accused before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court. Appellate defense counsel shall meet the requirements for counsel appearing before military commissions.[19]

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[13] *Id.* at § 11.2(b) (citing Austin v. United States, 513 U.S. 5 (1994)) (noting circuit court rules requiring counsel to prepare and file petitions for writ of certiorari upon request of defendant and adding that these rules should relieve counsel of such obligations where petition would present only frivolous claims).

[14] *Id.*

[15] Pennsylvania v. Finley, 481 U.S. 551 (1987).

[16] LAFAVE ET AL., *supra* note 12, at § 28.12(b).

[17] 18 U.S.C. § 3005.

[18] 10 U.S.C. § 949a(b)(2)(c)(ii).

[19] Regulation for Trial by Military Commission, ¶9-1 (a)(17) (2011).

6. Recommendation and Justification

Recommendation 70: Amend Article 70 by requiring to the greatest extent practicable that, in appeals of courts-martial in which the death penalty has been adjudged, at least one appellate defense counsel representing an accused must be learned in the law applicable to capital cases.

This proposed amendment would better align the appellate counsel rights of servicemembers with the rights provided to defendants facing the death penalty in in the military commissions and in federal civilian appellate courts.

Part II of the Report will address changes in the rules implementing Article 70, with particular attention to the applicable procedures for assigning qualified appellate defense counsel in capital cases.

7. Relationship to Objectives and Related Provisions

The proposal to assign "learned counsel" on appeal in capital cases, and the assistance of counsel for petitions for review by the military Courts of Criminal Appeals after Article 69 review, is consistent with the practice in the federal and state courts and the requirements at the trial level under the proposed amendments to Article 27.

As noted in the discussion of the proposed amendments to Article 69, the opportunity to submit an application to the Court of Criminal Appeals for review of an Article 69 decision would not establish a right to the assistance of government furnished counsel in preparing the submission. If, however, the Court of Criminal Appeals grants the application, the accused would receive the assistance of counsel under Article 70 in proceedings on the merits of the case before the Court of Criminal Appeals.

8. Legislative Proposal

SEC. 914. APPELLATE DEFENSE COUNSEL IN DEATH PENALTY CASES.

Section 870 of title 10, United States Code (article 70 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(f) To the greatest extent practicable, in any capital case, at least one defense counsel under subsection (c) shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a

civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

9. Sectional Analysis

Section 914 would amend Article 70 to require, to the greatest extent practicable, at least one appellate defense counsel shall be learned in the law applicable to capital cases in any case in which the death penalty was adjudged at trial. This change would provide the accused with the same access to an expert in death penalty litigation that is currently provided to defendants in Article III courts and before military commissions under Chapter 47a of Title 10.

Article 71 – Execution of Sentence; Suspension of Sentence

10 U.S.C. § 871

This Report would consolidate Articles 57 (Effective date of sentences), Article 57a (Deferment of sentences), and Article 71 (Execution of sentence; suspension of sentence) into Article 57. *See* Article 57, *supra.* Accordingly, the proposed legislation would strike Article 71.

Article 72 – Vacation of Suspension
10 U.S.C. § 872

1. Summary of Proposal

This proposal would amend Article 72 to authorize a special court-martial convening authority to detail a judge advocate to preside at the hearing that must be held before a suspended sentence can be vacated.

2. Summary of the Current Statute

Article 72 establishes the due process requirements to vacate a suspended court-martial sentence. In all general courts-martial and in special courts-martial where a bad-conduct discharge was adjudged, the special court-martial convening authority must personally conduct a hearing on the alleged violation. The special court-martial convening authority then forwards the record of the hearing to the general court-martial convening authority, who may vacate the suspension. In all other special courts-martial and summary courts-martial cases, Article 72 does not prescribe specific procedural requirements.[1]

3. Historical Background

Article 72 has not been substantially revised since the enactment of the UCMJ in 1950.[2]

4. Contemporary Practice

Vacation proceedings are conducted pursuant to R.C.M. 1109. A vacation hearing utilizes the rules applied in Article 32 proceedings under R.C.M. 405(g), (h)(1) and (i). In view of the impending changes to R.C.M. 405(g) implementing the recent amendments to Article 32, Part II of this report will address whether additional changes are needed to ensure that R.C.M. 1109 contains adequate procedural rules.[3]

5. Relationship to Federal Civilian Practice

In federal civilian practice, Fed. R. Crim. P. 32.1 governs the procedures for revoking a probationary or suspended sentence. Under the rule, a magistrate judge first conducts a probable cause hearing to determine if there is probable cause to believe that a violation occurred. If there is probable cause, a revocation hearing is held. At the revocation hearing the defendant is entitled to discovery and may present evidence and cross-examine

[1] *See* R.C.M. 1109(e) and (g).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *See* Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938-59,959 (Oct. 3, 2014).

adverse witnesses. The rules of evidence do not apply at a revocation hearing,[4] and a violation does not need to be proven beyond a reasonable doubt.[5] If the judge finds that the defendant violated the terms of the suspension or probation, the judge may revoke the suspension and resentence the defendant.[6] Revocation is mandatory if the defendant possessed a firearm, a controlled substance, or refused to take required drug tests.[7]

6. Recommendation and Justification

Recommendation 72: Amend Article 72 to allow the special court-martial convening authority to detail a judge advocate to conduct the vacation hearing.

This proposal removes the requirement that the special court-martial convening authority personally hold the vacation hearing. Instead, a judge advocate could be detailed to conduct the hearing.

This change would enable the convening authority to assign the responsibilities to an individual experienced in hearing procedures. As under current law, the results of the hearing would be provided to the general court-martial convening authority, who would continue to exercise discretion as to whether the suspension should be vacated.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to vacation proceedings in the civilian sector insofar as practicable in military criminal practice, and by enhancing efficiency during the post-trial phase of the court-martial process.

[4] Morrisey v. Brewer, 408 U.S. 471, 489 (1972) (laying out the minimum requirements of due process for revocation hearings, in which adherence to the rules of evidence is not included).

[5] United States v. Francischine, 512 F.2d. 827, 829 (5th Cir. 1975).

[6] 18 U.S.C. §3572(a).

[7] 18 U.S.C. §3572(b).

8. Legislative Proposal

SEC. 915. AUTHORITY FOR HEARING ON VACATION OF SUSPENSION OF SENTENCE TO BE CONDUCTED BY QUALIFIED JUDGE ADVOCATE.

(a) IN GENERAL.—Subsection (a) of section 872 of title 10, United States Code (article 72) of the Uniform Code of Military Justice), is amended by inserting after the first sentence the following new sentence: "The special court-martial convening authority may detail a judge advocate, who is certified under section 827(b) of this title (article 27(b)), to conduct the hearing.".

(b) TECHNICAL AMENDMENTS.—Such section (article) is further amended—

(1) in the last sentence of subsection (a), by striking "if he so desires" and inserting "if the probationer so desires"; and

(2) in the second sentence of subsection (b)—

(A) by striking "If he" and inserting "If the officer exercising general court-martial jurisdiction"; and

(B) by striking "section 871(c) of this title (article 71(c))." and inserting "section 857 of this title (article 57)).".

9. Sectional Analysis

Section 915 would amend Article 72, which establishes the process for vacating a suspended court-martial sentence. The amendments would authorize a special court-martial convening authority to detail a judge advocate qualified under Article 27(b) to preside at the vacation hearing, which must be held before a suspended sentence can be vacated. The detailed judge advocate would replace the special court-martial convening

authority at the hearing and would make factual determinations about whether a violation occurred. Under current law, the procedures applicable at vacation hearings under Article 72 are prescribed by cross-reference to R.C.M. 405, which provides the rules and procedures applicable at Article 32 hearings. The recent changes to Article 32 (Preliminary hearing) and R.C.M. 405 no longer provide a hearing structure that can be used in vacation proceedings. The implementing rules for Article 72 will be updated to reflect this change and to provide procedures applicable at vacation hearings.

Article 73 – Petition for a New Trial
10 U.S.C. § 873

1. Summary of Proposal

This proposal would amend Article 73 by increasing the period to file a petition for a new trial from two to three years, the time period provided in similar civilian proceedings.

2. Summary of the Current Statute

Article 73 permits an accused to petition the Judge Advocate General for a new trial because of "newly discovered evidence or fraud on the court." Under the statute, the time to file a petition is limited to two years from when the convening authority approved the sentence. If the case is pending on appeal, the Judge Advocate General must forward the petition to the appellate court for an appropriate decision.

3. Historical Background

When the UCMJ was first enacted in 1950, an accused's ability to petition the Judge Advocate General for a new trial was more limited. Petitions were only allowed within one year and were limited to cases that included at least a bad-conduct discharge or confinement of at least a year.[1] In 1968, the ability to file a petition was expanded to include all courts-martials and the time to file a petition was extended to two years.[2] Other than minor changes, the statute has not changed substantively since 1968.

4. Contemporary Practice

The President has implemented Article 73 through R.C.M. 1210, which restricts the circumstances when a petition for a new trial may be granted. Under the rule, a petition for new trial, for example, may not be granted because of newly discovered evidence when an accused pled guilty to an offense, or when the new evidence could have been discovered by the petitioner through the exercise of due diligence. In practice, most petitions are filed when the case is still pending before an appellate court and are resolved at that time.

5. Relationship to Federal Civilian Practice

In federal civilian practice, a motion for new trial because of newly discovered evidence may be filed within three years of the verdict.[3]

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] The Military Justice Act of 1968, Pub. L. No. 90-632, § 4(c), 82 Stat. 1335.

[3] FED. R. CRIM. P. 33(b)(1); *see also* FED. R. CRIM. P. 33(b)(2) (motion for a new trial for any other reason must be filed within 14 days of the verdict).

6. Recommendation and Justification

Recommendation 73: Amend Article 73 to expand the time to file a petition for a new trial from two years to three years.

This proposal would align military justice practice with federal civilian practice. In 1968, when Article 73 was amended to increase the time period for filing a petition for a new trial to two years, this was consistent with federal civilian practice. When the federal rules were amended to expand the time period to three years in 1998, no similar change was made to Article 73.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by employing the standards and procedures applicable to petitions for a new trial in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 916. EXTENSION OF TIME FOR PETITION FOR NEW TRIAL.

The first sentence of section 873 of title 10, United States Code (article 73 of the Uniform Code of Military Justice), is amended by striking "two years after approval by the convening authority of a court-martial sentence," and inserting "three years after the date of the entry of judgment under section 860c of this title (article 60c).".

9. Sectional Analysis

Section 916 would amend Article 73 to conform the statute to the proposed changes in Article 60 and to increase the time period for an accused to petition for a new trial from two years to three years, consistent with the three-year period in Fed. R. Crim. P. 33(b)(1).

Articles 74-75 – Remission and Suspension & Restoration

10 U.S.C. §§ 874-75

1. Summary of Proposal

This proposal would amend Article 75 to authorize regulations governing eligibility for pay and allowances during the period after a court-martial sentence is set aside or disapproved until any sentence is imposed upon a new trial or rehearing. Part II of the Report will propose rules implementing the change to Article 75. This Report recommends no change to Article 74.

2. Summary of the Current Statute

Article 74 provides the Service Secretaries and their designees the power to remit or suspend any part of an unexecuted part of any sentence, with two exceptions: (1) the power to act on a death sentence is retained by the President under Article 71(a); and (2) with respect to a sentence to life without parole, the Secretary concerned can only act after the accused has served no less than 20 years confinement, and may not delegate this power. Article 74 also gives the Service Secretaries the ability to substitute an administrative discharge for a punitive discharge or dismissal.

Article 75 concerns restoration of a member's rights, privileges and property following a court-martial conviction. The statute is divided into three subsections. Subsection (a) authorizes the President to prescribe regulations for the restoration of all rights, privileges, and property affected by an executed part of a court-martial sentence, except discharge or dismissal, which has been set aside or disapproved unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing. Subsection (b) provides that if a previously executed sentence of dishonorable or bad-conduct discharge is not imposed at a new trial, the Service Secretary can either allow the accused to serve out the remainder of his or her enlistment, or shall substitute an appropriate administrative discharge. Subsection (c) provides that if a previously executed sentence of dismissal is not imposed on a new trial, the Secretary concerned shall substitute an appropriate administrative discharge, and the commissioned officer dismissed by the sentence may be reappointed by the President alone to the commissioned grade and rank that, in the opinion of the President, the former officer would have attained had he or she not been dismissed.

3. Historical Background

Article 74 has remained unchanged since the UCMJ's enactment in 1950, except for one amendment in 2000 that added a restriction on the Service Secretary's authority to

delegate powers for sentences of life without parole.[1] Article 75 has remained unchanged since the UCMJ was first enacted.[2]

4. Contemporary Practice

DOD Instruction 1325.7 guides the services' implementation of Articles 74 and 75. The Instruction governs the administration of military correctional facilities, clemency and parole, restoration, and reenlistment. Under the Instruction, each Service Secretary is required to establish a Clemency and Parole Board to assist the Secretary to exercise clemency, parole, and mandatory supervised release authority, and to serve as the primary authority for administration of clemency, parole, mandatory supervised release, restoration to duty, and reenlistment actions. The Military Department Clemency and Parole Board has approval authority for nearly all clemency, parole, mandatory supervised release, restoration to duty, and reenlistment actions. The Boards strive to achieve uniformity, effectiveness, and efficiency in the administration of corrections functions and clemency and supervision programs, and are instructed to foster the safe and appropriate release of military offenders under terms and conditions consistent with the needs of society, the rights and interests of victims, and the rehabilitation of the prisoner.

Currently, the Army, Navy and Air Force each independently operate separate clemency and parole boards. The Coast Guard operates an independent clemency board, but utilizes the Navy board for matters relating to parole. To promote consistency in action, representatives from the Military Department Clemency and Parole Boards must meet at least semiannually to exchange views on clemency, parole, and mandatory supervised release philosophy; procedures; significant cases; and similar matters. Outside of the military justice system, as an additional check and balance, Congress has enabled the Service Secretaries, acting primarily through administrative boards, to correct military records and review discharges or dismissals.[3] These boards are not intended to circumvent the military justice system, but only to review matters submitted under certain guidelines and to act when necessary to correct an error or remove an injustice.[4]

There has been litigation on whether an accused, while pending a rehearing, is entitled to pay and allowances at his or her former grade. As a result of this litigation, current law has been interpreted as providing that an accused will not receive pay and allowances at the former grade, even if performing full military duties while awaiting the rehearing.[5]

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[1] NDAA FY 2001, Pub. L. No. 106-398, § 553(a), 555, 114 Stat. 1654 (2000).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] 10 U.S.C. §§ 1552 (Correction of military records); 10 U.S.C. § 1553 (Review of discharge or dismissal). The authority under Section 1553 does not extend to a discharge or dismissal by sentence of a general court-martial.

[4] *See id.*

[5] Dock v. United States, 46 F.3d 1083, 1091 (Fed. Cir. 1995). *But see* Keys v. Cole, 31 M.J. 228, 232 (C.M.A. 1990).

5. Relationship to Federal Civilian Practice

The federal parole system was created in 1910 and granted the power of parole over prisoners sentenced to terms of one year or more to boards of parole at several penitentiaries and prisons.[6] In 1930, Congress materially altered the parole system by disbanding the multiple board concept for a single parole board in the Department of Justice.[7] In 1987, the adoption of sentencing guidelines precipitated the removal of parole for all defendants whose offenses were committed on or after November 1, 1987.[8]

6. Recommendation and Justification

Recommendations 74: No change to Article 74.

In light of the well-developed case law and stable practice concerning Article 74, a statutory change is not necessary. Part II of the Report will consider whether any changes are needed in the rules implementing Article 74.

Recommendation 75: Amend Article 75 to require the President to establish rules governing the eligibility for pay and allowances during the period after a court-martial sentence is set aside or disapproved.

Under this proposal, the President would establish rules governing the eligibility criteria for pay and allowances during the period after a court-martial sentence is set aside or disapproved. This would clarify the circumstances under which pay and allowances would be authorized during the pendency of the new trial.

The proposed amendment would clarify the authority to provide pay and allowances to a servicemember who is performing duties while pending rehearing to receive pay and allowances. Part II of this Report will propose rules limiting this provision to periods when an accused is not in confinement while awaiting the rehearing.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Articles 74 and 75 are in addition to the Service Secretaries' clemency and parole authority under 10 U.S.C. §§ 951-954.

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[6] U.S. DEP'T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 6 (2003).

[7] *Id*. at 7.

[8] *Id*. at 28.

8. Legislative Proposal

SEC. 917. RESTORATION.

Section 875 of title 10, United States Code (article 75 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) The President shall prescribe regulations, with such limitations as the President considers appropriate, governing eligibility for pay and allowances for the period after the date on which an executed part of a court-martial sentence is set aside.".

9. Sectional Analysis

Section 917 would amend Article 75, which provides the basic rules and procedures for the restoration of a member's rights, privileges, and property when a court-martial conviction is set aside during review. As amended, the statute would authorize the President to establish regulations governing when an accused may receive pay and allowances while pending a rehearing. The implementing rules will set forth the authority to provide pay and allowances to an accused who is pending a rehearing, performing duties, and not in confinement.

Article 76 – Finality of Proceedings, Findings, and Sentences
10 U.S.C. § 876

1. Summary of Proposal

This Report recommends no change to Article 76. Part II of the Report will consider whether any changes are needed in the rules implementing Article 76.

2. Summary of the Current Statute

Article 76 concerns the finality of courts-martial. Under the statute, the findings and sentence of a court-martial that have been approved, reviewed, or affirmed as required by the UCMJ are final and conclusive on all courts and agencies of the United States.

3. Historical Background

Other than minor changes, Article 76 has remained unchanged since the UCMJ was enacted in 1950.[1]

4. Contemporary Practice

Article 76 serves to provide finality to court-martial verdicts and to limit the collateral review of courts-martial by other courts and agencies. The Supreme Court has addressed Article 76 in the context of identifying the standards and procedures applicable to collateral review of courts-martial.[2] The Court of Appeals for the Armed Forces has addressed Article 76 in the context of collateral review within the military justice system.[3]

5. Relationship to Federal Civilian Practice

In federal civilian practice, a federal judgment generally becomes final for appellate review and claim preclusion purposes when the district court "disassociates" itself from the case, leaving nothing to be done except the execution of the judgment.[4] United States district court orders that are properly appealed may be reviewed by an appellate court.[5] For cases

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[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See*, *e.g.*, Burns v. Wilson, 346 U.S. 137, 152 (1953); Schlesinger v. Councilman, 420 U.S. 738, 753 (1975); United States v. Denedo, 556 U.S. 904, 915 (2009).

[3] *See*, *e.g.*, Loving v. United States, 68 M.J. 1 (C.A.A.F. 2009).

[4] *See* Clay v. United States, 537 U.S. 522, 527 (2003).

[5] *See* Union Pac. R. Co. v. Greentree Transp. Trucking Co., 293 F.3d 120, 126 (3d Cir. 2002).

that are appealed, finality attaches when the time for filing a certiorari petition to the Supreme Court expires, the Supreme Court denies a petition for a writ of certiorari, or the Supreme Court affirms a conviction.[6]

6. Recommendation and Justification

Recommendation 76: No change to Article 76.

In view of the well-developed case law addressing Article 76's provisions, a statutory change is not necessary.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 76.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by using the current UCMJ as a point of departure for a baseline reassessment.

[6] *Clay*, 537 U.S. at 527.

Article 76a – Leave Required to be Taken Pending Review of Certain Court-Martial Convictions

10 U.S.C. § 876a

1. Summary of Proposal

This proposal would align the language of Article 76a with proposed changes in Article 60 (Action by the Convening Authority) and the proposed new Article 60c (Entry of judgment), with no substantive changes. Part II of the Report will consider whether any changes are needed in the rules implementing Article 76a.

2. Summary of the Current Statute

Article 76a authorizes the services, at their discretion, to involuntarily place an accused on leave if the accused has been sentenced to an unsuspended punitive discharge or dismissal that has been approved by the convening authority.

3. Historical Background

Article 76a was enacted in 1981, and was amended in 1983 to address the status of personnel who had been convicted at courts-martial but whose cases were in the process of appellate review.[1] The statute was designed to give the services the option of placing the accused on involuntary leave following a court-martial conviction where the accused's sentence included a dismissal or a punitive discharge. Prior to Article 76a, the services had no other option for an accused in this scenario but to retain the individual in a full-pay status pending completion of review.

4. Contemporary Practice

The term "appellate leave" is used to refer to both involuntary appellate leave of Article 76a and voluntary appellate leave. The accused frequently requests to be placed on appellate leave either through an obligation in a pretrial agreement or on the accused's own volition. A servicemember in appellate leave status has access to medical, dental, exchange, and commissary benefits. The member is placed in a no-pay status, except for payments attributable to accrued leave.

[1] Military Justice Amendments of 1981, Pub. L. No. 97–81, 95 Stat 1085; Military Justice Act of 1983, Pub. L. No. 98–209, § 5(g), 97 Stat 1393.

5. Relationship to Federal Civilian Practice

Although largely a military specific issue, appellate leave draws some similarities to circumstances in which certain public officials are placed on involuntary administrative leave without pay pending the conclusion of a criminal or administrative investigation.[2]

6. Recommendation and Justification

Recommendation 76a: Amend Article 76a to align the statute with proposed changes in Articles 60, 60a, 60b, and 60c, with no substantive changes.

Given the well-developed case law addressing Article 76a's provisions, a substantive statutory change is not necessary. The statute allows the government to remove personnel from a unit who have been convicted at courts-martial and whose sentence includes dismissal or a punitive discharge. This serves to preserve good order and discipline within the unit and restricts expenditures on pay and allowances for those sentenced to discharge or dismissal. In some cases convicted members find appellate leave advantageous in terms of early separation from the military environment and an opportunity to transition to civilian life.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 918. LEAVE REQUIREMENTS PENDING REVIEW OF CERTAIN COURT-MARTIAL CONVICTIONS.

Section 876a of title 10, United States Code (article 76a of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking ", as approved under section 860 of this title (article 60),"; and

[2] 5 U.S.C. § 7532.

(2) in the second sentence, by striking "on which the sentence is approved under section 860 of this title (article 60)" and inserting "of the entry of judgment under section 860c of this title (article 60c).".

9. Sectional Analysis

Section 918 would align the language of Article 76a with proposed changes in Article 60 (Action by the Convening Authority) and the proposed new Article 60c (Entry of Judgment), with no substantive changes. Article 76a currently authorizes the services, at their discretion, to involuntarily place an accused on leave if the accused has been sentenced to an unsuspended punitive discharge or dismissal that has been approved by the convening authority.

Article 76b – Lack of Mental Capacity or Mental Responsibility: Commitment of Accused for Examination and Treatment

10 U.S.C. § 876b

1. Summary of Proposal

This Report recommends no change to Article 76b. Part II of the Report will consider whether any changes are needed in the rules implementing Article 76b.

2. Summary of the Current Statute

Article 76b provides the rules and procedures applicable when an accused is found either mentally incompetent to stand trial, or not guilty by reason of lack of mental responsibility. Under subsection (a) of the statute, when an accused is found incompetent to stand trial, the accused is committed to the custody of the Attorney General. The Attorney General must then follow the requirements of 18 U.S.C. § 4241(d). After an initial period of required hospitalization, the accused is either returned to the custody of the convening authority (if the accused is determined to be competent) or indefinitely hospitalized until found competent pursuant to 18 U.S.C. § 4246. Under subsection (b), when an accused is found not guilty by reason of lack of mental responsibility, the court-martial must conduct a hearing pursuant to 18 U.S.C. § 4243. During that hearing, the accused must prove by clear and convincing evidence that he no longer poses a threat of bodily injury or serious property damage due to mental disease or defect. If the charged crime did not involve bodily injury or serious damage to property, the accused's burden is only by a preponderance of the evidence. If the accused fails to meet this standard, he may be committed to the custody of the Attorney General. The Attorney General must then follow the procedures of 18 U.S.C. § 4243 concerning the accused's hospitalization.

3. Historical Background

Article 76b was added to the Code in 1996, the same year that the principal underlying federal statute (18 U.S.C. § 4243—Hospitalization of a person found not guilty only by reason of insanity) was last amended.[1]

4. Contemporary Practice

The President has implemented Article 76b, in part, through R.C.M. 909, which provides the procedures for incompetence determination hearings. Findings of mental incompetency

[1] NDAA FY 1996, Pub. L. No. 104-106, § 1133(c), 110 Stat. 461-67; 502 (codified at 10 U.S.C. § 876b); Pub. L. No. 104-294, Title III, § 301(a), 110 Stat. 3494 (codified at 18 U.S.C. § 4243).

and findings of not guilty due to lack of mental responsibility are exceptionally rare in military practice.[2] When these matters are raised, the procedures of Article 76b and R.C.M. 909 are generally followed without issue.[3]

5. Relationship to Federal Civilian Practice

The rules and procedures applicable under Article 76b largely mirror the rules and procedures applicable in federal civilian practice with respect to commitment of the accused for mental examination and treatment, as codified in 18 U.S.C. §§ 4241-4247. Given the purposeful modeling of Article 76b off of the corollary Title 18 statutes cited above, there is little variation in military practice and federal civilian practice in this area.

6. Recommendation and Justification

Recommendation 76b: No change to Article 76b.

Article 76b reflects current federal law and practice.

The statute and the rule implementing the statute are uncontroversial and stable, and there are no reported problems with the statute in its current form.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by employing the standards and procedures of the civilian sector insofar as practicable in the area of mental incapacity and lack of mental responsibility.

[2] *See* Major Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation for Mentally Ill Servicemembers*, 2005 ARMY LAWYER 1, 1 (December 2005) (noting the majority of military justice practitioners rarely encounter lack of mental responsibility issues at trial).

[3] *See, e.g.*, United States v. Salhuddin, 54 M.J. 918, 920 (A.F. Ct. Crim. App. 2001) (upholding convening authority's order to commit the servicemember to the custody of the Attorney General pursuant to R.C.M. 909(c) after a "sanity board" convened under R.C.M. 706 found the servicemember incompetent to stand trial).

Subchapter X. Punitive Articles

Article 77 – Principals
10 U.S.C. § 877

1. Summary of Proposal

This Report recommends no change to Article 77. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing Article 77.

2. Summary of the Current Statute

Article 77 sets forth a standard of accountability that applies to all offenses under the UCMJ. Under Article 77, a person is liable as a principal if the person: (1) commits an offense under the UCMJ; (2) aids, abets, counsels, commands, or procures the commission of an offense under the UCMJ; or (3) causes the commission of an offense under the UCMJ.

3. Historical Background

Principal liability was a common-law concept used in American military law from 1775 to 1949.[1] The inclusion of Article 77 in the UCMJ as enacted in 1950 provided a specific statutory provision and replaced the common-law distinctions between aider and abettor and accessory-before-the-fact liability. Article 77 has not been amended since the UCMJ's enactment in 1950.[2]

4. Contemporary Practice

Article 77—which applies the doctrine of principals to all offenses under the UCMJ—does not establish a separate offense. In addition to covering perpetrators, criminal liability under Article 77 extends to others who assist, encourage, advise, instigate, counsel, command, or procure another person to commit an offense; or who assist, encourage, or advise another in the commission of the offense.[3]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 588, 592, 654 (photo reprint 1920) (2d ed. 1896) (discussing aiders and abettors as "principals" to the underlying misconduct).

[2] 10 U.S.C. § 877.

[3] Article 77 is often used to charge and hold accountable servicemembers as principals under an aiding and abetting theory. *See, e.g.,* United States v. Mitchell, 66 M.J. 176, 180 (C.A.A.F. 2008) (accused was guilty of indecent assault for encouraging perpetrator to have sex with the victim). *But see, e.g.,* United States v. Bennitt, 72 M.J. 266, 269 (C.A.A.F. 2013) (accused was not guilty of involuntary manslaughter for a death caused by overdose after he prepared the drug for the victim); United States v. Simmons, 63 M.J. 89, 93-94 (C.A.A.F. 2006) (accused was not guilty of a physical assault when he failed to intervene and stop the fight because he did not share assailant's criminal intent).

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2 (Principals) is nearly identical to Article 77.[4] The only difference between 18 U.S.C. § 2 and Article 77 is that the former includes the word "induces" in the list of actions describing principal liability, whereas Article 77 does not.[5]

6. Recommendation and Justification

Recommendation 77: No change to Article 77.

In view of the well-developed case law addressing Article 77's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by minimizing change when established military law is similar to the law applied in U.S. district courts.

[4] The legislative history of Article 77 indicates that Congress intended both statutes to share the same scope. *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1240 (1949).

[5] *Compare* Article 77 ("Any person punishable under this chapter who . . . aids, abets, counsels, commands, or procures its commission. . . ") *with* 18 U.S.C. § 2 ("Whoever . . . aids, abets, counsels, commands, *induces* or procures its commission . . . .") (emphasis added).

Article 78 – Accessory After the Fact
10 U.S.C. § 878

1. Summary of Proposal

This Report recommends no change to Article 78. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 78.

2. Summary of the Current Statute

Article 78 prohibits a person subject to the UCMJ from receiving, comforting, or assisting an offender for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

3. Historical Background

Article 78 was derived from 18 U.S.C. § 3 and conforms to prior military practice.[1] Article 78 has not been amended since the UCMJ's enactment in 1950.[2]

4. Contemporary Practice

Article 78 imposes criminal liability on those who knowingly render assistance to offenders after the offender has committed the crime, provided that those giving assistance do so knowing that an offense punishable by the UCMJ has been committed.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 3 (Accessory after the fact) is nearly identical to Article 78. The only difference between 18 U.S.C. § 3 and Article 78 is that the former includes the word "relieves" in the list of actions describing accessory after the fact, whereas Article 78 does not.[3]

6. Recommendation and Justification

Recommendation 78: No change to Article 78.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1224 (1949).

[2] Article 78, UCMJ (1950).

[3] *Compare* Article 78 ("receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment . . . ") *with* 18 U.S.C. § 3 ("Whoever . . . receives, *relieves*, comforts or assists the offender in order to prevent his apprehension, trial or punishment . . . .") (emphasis added).

In view of the well-developed case law addressing Article 78's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance of minimizing change when established military law is the law applied in U.S. district courts.

Article 79 – Conviction of Lesser Included Offense
10 U.S.C. § 879

1. Summary of Proposal

This proposal would amend Article 79 to authorize the President to designate an authoritative but non-exhaustive list of lesser included offenses for all punitive articles in the UCMJ. Part II of the Report will address changes in the Manual provisions implementing Article 79 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 79 defines lesser included offenses under military law as those "necessarily included" in a greater offense, or attempts to commit either the charged offense or an offense necessarily included. Article 79 does not otherwise provide a list of lesser included offenses to specific punitive articles in the UCMJ.

3. Historical Background

Article 79 was derived[1] from the Federal Rules of Criminal Procedure.[2] The statute has remained unchanged since the UCMJ was enacted in 1950.[3] In the 1951 Manual, the President provided a list of lesser included offenses for the punitive articles, styled as the "Table of Commonly Included Offenses."[4] However, the introduction to this Table cautioned practitioners that it was only intended as a guide; it was neither an all-inclusive list nor could it be applied mechanically in every case.[5]

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[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1224 (1949) (citing FED. R. CRIM. P. 31(c) (1949)).

[2] Before the UCMJ was enacted, the military employed by regulation a "lesser kindred offense" doctrine. The Articles of War did not contain a statutory provision for lesser included offenses. For example, in 1890, an Army instruction manual provided that, "[i]f the evidence proves the commission of an offense less than that specified, yet kindred thereto, the court may except words of the specification, substitute others instead, pronounce the guilt and innocence of the substituted and excepted words respectively, and then find the accused not guilty of the charge, but guilty of the lesser kindred offense." P. HENRY RAY, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES (1890). It was not until 1921 that the MCM for the first time employed the phrase "lesser included offense." MCM 1921, ¶¶298, 300, 377.

[3] 10 U.S.C. § 879.

[4] MCM 1951, App. 12.

[5] *Id.*

4. Contemporary Practice

The lesser included offense doctrine provides the accused with notice of potential offenses that the accused should be prepared to defend against at trial as well as the basis to plead double jeopardy in a later case.[6]

Article 79 mirrors Federal Rule of Criminal Procedure 31(c) defining lesser included offenses, and the test for determining whether an offense is a lesser included offense under Article 79 – the elements test – is derived from the test used by the federal civilian courts under Rule 31(c).[7] Under the elements test, an offense is necessarily included in a greater offense when the elements of the lesser offense are a subset of the elements of the charged offense.[8]

Part IV of the Manual for Courts-Martial, which covers substantive offenses, provides a list of lesser included offenses for many of the punitive articles. The listing of lesser included offenses in Part IV has been treated as constituting persuasive but not binding authority.[9]

Applying the elements test as the basis for satisfying Article 79 has resulted in exclusion of Article 134 offenses as lesser included offenses of any enumerated punitive article.[10] This is because the terminal element of Article 134, requiring an offense to be of a nature to discredit the armed forces or prejudicial to good order and discipline, is neither articulated nor inherent in any of the enumerated punitive articles. As a result, offenses that otherwise would be factually subsumed within a greater offense, *e.g.* negligent homicide as a lesser included offense of murder, do not currently qualify as a lesser included offense because of the terminal element of Article 134.[11]

5. Relationship to Federal Civilian Practice

Federal Rule of Criminal Procedure 31(c) is identical to Article 79. Both military and federal courts utilize the "elements test" to determine "necessarily included" lesser offenses. A minority of the states follow this approach as well.[12] However, the "elements

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[6] United States v. Schmuck, 489 U.S. 705, 720-21 (1989).

[7] United States v. Jones, 68 M.J. 465, 469-70 (C.A.A.F. 2010).

[8] *Id*. at 468.

[9] *Id.* at 471-72 (citing United States v. Miller, 67 M.J. 385, 388 n.5 (C.A.A.F. 2009)).

[10] *United States v. Jones* held that the "elements" test excluded Article 134 offenses from qualifying as lesser included offense of "enumerated" punitive articles. 68 M.J. at 473. The Court's decision in *Jones* was premised upon *Miller*, holding that the Article 134 "terminal elements" are not inherently included in every punitive article. 67 M.J. at 388, *overturning* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994).

[11] *See* United States v. Girouard, 70 M.J. 5, 9 (C.A.A.F. 2011); United States v. McMurrin, 70 M.J. 15, 17 (C.A.A.F. 2011).

[12] Fourteen states follow a strict application of the elements test, including Arizona, Colorado, Iowa, Massachusetts, Michigan, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, South Carolina, Wisconsin, and Wyoming. *See* Amanda Peters, *Thirty-One Years in the Making: Why the Texas Court of Criminal*

test" is not constitutionally required if the accused receives notice of the lesser included offenses.[13] Accordingly, the majority of states employ one of the three alternate theories: (1) cognate-pleadings approach;[14] (2) cognate evidence approach;[15] and (3) inherently-related offense approach.[16] One example is the approach taken by the State of Florida, where the Florida Supreme Court provides notice by publishing an exhaustive list of lesser included offenses for the state's criminal code.[17]

Appeals' New Single-Method Approach to lesser-Included Offense Analysis is a Step in the Right Direction, 60 BAYLOR L. REV. 231, 238 (2008) (citations omitted).

[13] Federal courts considering the issue have held that the due process notice requirement may be satisfied even if the indictment or information was deficient so long as the defendant received actual notice of the charges against him and the inadequate indictment did not lead to a trial with an unacceptable risk of convicting the innocent. *See* Hartman v. Lee, 283 F.3d 190, 195 (4th Cir. 2002); Parks v. Hargett, 188 F.3d 519, *3 (10th Cir. 1999) ("need not decide whether the charging information in this case was sufficiently specific because it is clear that Parks received actual notice of the specific charges against him"); Hulstine v. Morris, 819 F.2d 861, 864 (8th Cir.1987) ("Due process requirements may be satisfied if a defendant receives actual notice of the charges against him, even if the indictment or information is deficient.").

For a general discussion of the superiority of actual notice to constructive notice, see Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193 (9th Cir. 2008) ("Because due process does not require actual notice of a pending action, it follows a fortiori that actual notice satisfies due process"), *aff'd* 559 U.S. 260, 261 (2010) ("[A]ctual notice more than satisfied due process rights").

[14] The cognate-pleadings approach uses the pleadings, rather than the statutory elements, to determine whether a lesser-included offense charge is acceptable. States using this approach compare the elements, as modified by the defendant's charging instrument, to the elements of the proposed lesser-included offense. At least seven states utilize this approach, including California, Connecticut, Florida, Idaho, Pennsylvania, Tennessee, and Washington. *Id*. at 240 (citations omitted).

[15] The cognate-evidence approach allows a court to examine all the evidence admitted during the course of the trial in determining whether an offense is truly a lesser-included offense. Commentators have noted that this approach often results in a larger universe of available lesser included offenses at trial with the added likelihood that defendants may be deprived of due process "notice" as to which criminal theories of liability they should be prepared to defend themselves against. *See* Peters, *supra* note 12, at 240 (citations omitted). Nonetheless, at least five states still employ this approach, including: Alabama; Alaska; Kentucky; Oklahoma; and Utah. *Id.* at 241 (citations omitted).

[16] The inherently-related offense approach is the most liberal construction theory applied in the United States and is utilized by the fewest states. It permits a lesser included offense instruction even if the proof of one offense does not invariably require proof of the others as long as the two offenses serve the same legislative goals. This is the approach championed by the Model Penal Code, Section 107(4) (1980), and at least four states currently employ this test: Illinois, Mississippi, Montana, and New Jersey. *See* Peters, *supra* note 12, at 242 (citations omitted).

[17] *Schedule of Lesser Included Offenses*, Supreme Court of Florida (2007), *available at* http://www.floridasupremecourt.org/jury_instructions/chapters/chapter33/schedlesserincludoffens.rtf (*last accessed* 22 February 2015); In re Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 596 (Fla. 1981) (noting the Florida Supreme Court LIO list is: "designed to be a complete, authoritative compilation that is presumed to be correct and upon which a trial court can confidently rely.").

6. Recommendation and Justification

Recommendation 79: Amend Article 79 to provide statutory authority for the President to designate lesser included offenses.

The military justice system has a significant number of unique, but closely related, military offenses, which are not "necessarily included" lesser offenses under the "elements test." If authorized by statute, the President could publish an authoritative, non-exhaustive list of "reasonably included" lesser offenses. Convening authorities could then refer to trial only the charges that capture the gravamen of the accused's misconduct, instead of having to file additional, alternative charges, which unnecessarily expose the accused to excessively greater criminal liability. The President's list would afford trial participants actual notice of lesser included offenses pertinent to the case, compared to the "elements test," which only gives constructive notice of these offenses.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1002. CONVICTION OF OFFENSE CHARGED, LESSER INCLUDED OFFENSES, AND ATTEMPTS.

Section 879 of title 10, United States Code (article 79 of the Uniform Code of Military Justice), is amended to read as follows:

"**§879. Art. 79. Conviction of offense charged, lesser included offenses, and attempts**

"(a) IN GENERAL.—An accused may be found guilty of any of the following:

"(1) The offense charged.

"(2) A lesser included offense.

"(3) An attempt to commit the offense charged.

"(4) An attempt to commit a lesser included offense, if the attempt is an offense in its own right.

"(b) DEFINITION.—In this section (article), the term 'lesser included offense' means—

"(1) an offense that is necessarily included in the offense charged; and

"(2) any lesser included offense so designated by regulation prescribed by the President.

"(c) REGULATORY AUTHORITY.—Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense.".

9. Sectional Analysis

Section 1002 would amend Article 79 and retitle the statute as "Conviction of offense charged, lesser included offenses, and attempts." As amended, Article 79 would authorize the President to designate an authoritative, but non-exhaustive, list of lesser included offenses for each punitive article of the UCMJ in addition to judicially determined lesser included offenses. This change would provide actual notice of applicable lesser included offenses to all parties. Implementing provisions will provide the President with the flexibility to designate factually similar offenses as lesser included offenses under a "reasonably included" standard. The "reasonably included" standard would enhance actual notice by requiring a measurable relationship between the greater offense and the listed offense.

Presidentially designated lesser included offenses under Article 79 and the implementing provisions and judicially determined lesser included offenses would work in concert at trial. The statute's implementing provisions would explain to practitioners that potential lesser included offenses may be established at trial either by: (1) designation by the President; or (2) by the military judge at trial when the military judge determines that an offense raised by the evidence at trial is "necessarily included within the greater offense."

Article 80 – Attempts
10 U.S.C. § 880

1. Summary of Proposal

This Report recommends no change to Article 80. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 80.

2. Summary of the Current Statute

Article 80 prohibits an act by a person subject to the UCMJ done with the intent to commit an offense under the UCMJ. The act must amount to more than mere preparation but need not result in commission of the offense.

3. Historical Background

Article 80 was derived from prior military practice under the Articles of War and Articles for Government of the Navy.[1] The statute has remained unchanged since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

Article 80 imposes criminal liability on offenders who perform an overt act with the specific intent to commit an offense under the UCMJ. Article 80 requires more than mere preparation to commit the target offense; the overt act must constitute a "substantial step" that directly tends to accomplish the unlawful purpose.[3] Article 79 (conviction of lesser included offense) designates attempts as lesser-included offenses with respect to every punitive article of the UCMJ.

The President, under Article 56, has prescribed the following maximum punishment for the offense of Attempt: the same maximum punishment as the underlying offense, except that the death penalty shall not be adjudged, the mandatory minimum punishment provisions

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1224 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 248-249 (1951).

[2] 10 U.S.C. § 880.

[3] *See* United States v. Winckelmann, 70 M.J. 403, 407 (C.A.A.F. 2011) ("a substantial step must 'unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances.'") (citations omitted).

shall not apply, and, other than for attempted murder, no confinement exceeding 20 years shall be adjudged.[4]

5. Relationship to Federal Civilian Practice

Article 80 has no direct counterpart in federal law. Unlike the UCMJ and state law, federal law has no generally applicable crime of attempt; instead, Congress has outlawed the attempt to commit a number of individual federal crimes. Generally, it is not a crime to attempt to commit most federal offenses.[5]

6. Recommendation and Justification

Recommendation 80: No change to Article 80.

In view of the well-developed case law addressing Article 80's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[4] MCM, Part IV, ¶4.e.

[5] CHARLES DOYLE, CONG. RESEARCH SERV., R42002, "ATTEMPT: AN ABRIDGED OVERVIEW OF FEDERAL CRIMINAL LAW," at 1 (2011), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R42002_09132011.pdf.

Article 81 – Conspiracy
10 U.S.C. § 881

1. Summary of Proposal

This Report recommends no change to Article 81. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 81.

2. Summary of the Current Statute

Article 81(a) prohibits a person from entering into an agreement with one or more other individuals to commit an offense under the UCMJ. Article 81(b) provides that in time of war, the offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

Enacted in 1950, Article 81 was derived from 18 U.S.C. § 371.[1] In 2006, the statute was amended to add subsection (b) which makes conspiracy in violation of the law of war that results in death an offense punishable by the death penalty at a court-martial or military commission.[2]

4. Contemporary Practice

Under Article 81, one or more of the conspirators must do some overt act to affect the object of the conspiracy.[3] The President, under Article 56, has prescribed the following maximum punishment for the offense of Conspiracy: the maximum punishment authorized for the offense which is the object of the conspiracy, except that the death penalty may not be adjudged.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 371 (Conspiracy to commit offense or to defraud the United States) is nearly identical to Article 81.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1224 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 194, 249-50 (1951).

[2] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat 2600 (2006).

[3] MCM, Part IV, ¶5.c.(4)(a); United States v. Harman, 68 M.J. 325, 327 (C.A.A.F. 2010) (applying the elements of conspiracy as contained in the MCM).

[4] MCM, Part IV, ¶5.e.

6. Recommendation and Justification

Recommendation 81: No change to Article 81.

In view of the well-developed case law addressing Article 81's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 82 – Solicitation
10 U.S.C. § 882

1. Summary of Proposal

This proposal would consolidate all solicitation offenses into one punitive Article. The general offense of soliciting another to commit an offense currently in Article 134 (the General Article) [1] would be migrated into Article 82 (Solicitation) to create a comprehensive "solicitation" offense which criminalizes soliciting the commission of any offense punishable under the UCMJ.[2] The punishments for all solicitation offenses would remain the same. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 82 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 82 prohibits a person from soliciting or advising others to commit any of the following four offenses: Desertion (Article 85); Mutiny (Article 94); Sedition (Article 94); or Misbehavior Before the Enemy (Article 99). Article 82 provides that if the offense solicited is attempted or committed, the accused may be punished with the punishment provided for in the commission of the offense, but if the offense solicited is not attempted or committed, the accused may be punished as a court-martial may direct.

3. Historical Background

Solicitation was not an enumerated offense in either the Articles of War or the Articles for Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] Article 82 has remained unchanged.

4. Contemporary Practice

Under current law, the government must charge a solicitation offense under either Article 82 or Article 134, depending upon the crime solicited. Article 82 prohibits a servicemember from soliciting others to commit the offenses of desertion (Article 85), mutiny (Article 94), sedition (Article 94), or misbehavior before the enemy (Article 99),

[1] MCM, Part IV, ¶105.

[2] The offense of soliciting another to commit an offense is discussed in this Report under "Article 82 – Solicitation – Addendum."

[3] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1238 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

each of which has been a matter of deep concern for commanders since the inception of military justice.[5]

The maximum punishments for "solicitation" were based upon corollary Title 18 solicitation statutes.[6] The President, under Article 56, has prescribed the following maximum punishments for the offense of Solicitation under Article 82:

If the solicited offense has been committed, then the maximum punishment is the same as that authorized for the committed offense (including the death penalty for capital offenses); and

If the solicited offense has only been attempted, dishonorable discharge, forfeiture of all pay and allowances, and, depending on the specifics of the underlying offense, confinement for up to 10 years.[7]

5. Relationship to Federal Civilian Practice

Federal law sets forth similar offenses to Article 82, including solicitation of others to commit crimes of violence,[8] bribing public officials,[9] and soliciting gifts.[10]

6. Recommendation and Justification

Recommendation 82: Transfer the general solicitation offense defined under Article 134, the General Article (MCM, Part IV, ¶105), to Article 82.

The proposed amendments would align solicitation offenses under Article 82.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] DAVID A. SCHLUETER, ET AL., MILITARY CRIMES AND DEFENSES § 4.7[2] (2012) (footnotes omitted).

[6] *Id.* at 194.

[7] MCM, Part IV, ¶6.e.

[8] 18 U.S.C. § 373.

[9] 18 U.S.C. § 211.

[10] 18 U.S.C. § 663.

8. Legislative Proposal

SEC. 1003. SOLICITING COMMISSION OF OFFENSES.

Section 882 of title 10, United States Code (article 82 of the Uniform Code of Military Justice), is amended to read as follows:

"§882. Art. 82. Soliciting commission of offenses

"(a) SOLICITING COMMISSION OF OFFENSES GENERALLY.—Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct.

"(b) SOLICITING DESERTION, MUTINY, SEDITION, OR MISBEHAVIOR BEFORE THE ENEMY.—Any person subject to this chapter who solicits or advises another to violate section 885 of this title (article 85), section 894 of this title (article 94), or section 99 of this title (article 99)—

"(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and

"(2) if the offense solicited or advised is not attempted or committed, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1003 would amend Article 82 and retitle the statute as "Soliciting commission of offenses." The amendments would migrate the general solicitation offense under Article 134 into Article 82, as a separate subsection before the specific solicitation offenses in the existing statute. The general solicitation offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article

134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. Implementing provisions will maintain the same punishments for all solicitation offenses as under current law.[11]

[11] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 82 – Solicitation – Addendum
(Soliciting Another to Commit an Offense)

1. Summary of Proposal

This proposal would migrate the offense of soliciting another to commit an offense currently addressed under Article 134 (the General Article) into Article 82 (Soliciting commission of offenses). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶105, the offense consists of soliciting or advising another to commit an offense under the UCMJ other than the four offenses of desertion, mutiny, sedition, or misbehavior before the enemy listed in Article 82, with the intent that the offense actually be committed. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated the offense of solicitation under Article 134 in the 1984 MCM.[1]

4. Contemporary Practice

Under current law, the government must charge a solicitation offense under either Article 82 or Article 134, depending upon the crime solicited. The President, under Article 56, has prescribed the following maximum punishment for the offense of Soliciting Another to Commit an Offense: 5 years confinement or the maximum punishment for the underlying solicited offense, whichever is less.[2]

5. Relationship to Federal Civilian Practice

Federal law sets forth similar offenses to Article 134, ¶105, including solicitation of others to commit crimes of violence,[3] bribing public officials,[4] and soliciting gifts.[5]

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[1] MCM 1984, App. 23, ¶105.

[2] MCM, Part IV, ¶105.e.

[3] 18 U.S.C. § 373 (2014).

[4] 18 U.S.C. § 211 (2014).

6. Recommendation and Justification

Recommendation 134-105: Migrate the general solicitation offense defined under Article 134, the General Article (MCM, Part IV, ¶105), to Article 82.

The offense of soliciting another to commit an offense is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.[6]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 82 (Solicitation), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 82 (Solicitation), *supra*, at paragraph 9.

[5] 18 U.S.C. § 663 (2014).

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 83 (Current Law) – Fraudulent Enlistment, Appointment, or Separation
10 U.S.C. § 883

1. Summary of Proposal

This Report recommends no change to Article 83, except to redesignate it under Article 104a as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 104a as necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 83 prohibits servicemembers from joining or leaving the military through false or fraudulent means, or by deliberate concealment as to qualifications for enlistment or appointment or eligibility for separation.

3. Historical Background

Article 83 is derived from Article 54 of the 1920 Articles of War and Article 22(b) of the 1930 Articles for the Government of the Navy.[1] Since the UCMJ was enacted in 1950,[2] the statute has remained unchanged.

4. Contemporary Practice

When servicemembers enlist, they obligate themselves contractually for a term of service. This private contract between the individual and the U.S. government confers military status and jurisdiction on the individual. A fraudulent enlistment or separation does not affect the previously created status.[3]

Article 83 (Fraudulent enlistment, appointment, or separation) is a companion article to Article 84 (Unlawful enlistment, appointment, or separation), which concerns the criminal liability of servicemembers who assist others in obtaining a fraudulent enlistment, appointment, or separation.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1225 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 250-51 (1951) (noting that Article 83 extended "fraudulent enlistment" to officers for the first time).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *See* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.2[2] at 206 (2012) (footnotes omitted); *see also* Article 3(b) (preserving court-martial jurisdiction over servicemembers who fraudulently separate military service).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Fraudulent enlistment, appointment or separation: dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 5 years.[4]

5. Relationship to Federal Civilian Practice

Article 83 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 83: No change to Article 83, except to redesignate it as Article 104a.

In view of the well-developed case law addressing Article 83's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

This recommendation is related to this Report's recommended amendment to Article 43, which would extend the statute of limitations for Article 83 cases to the length of the period of enlistment or appointment or five years, whichever period is longer.

[4] MCM, Part IV, ¶7.e.

Article 84 (Current Law) – Unlawful Enlistment, Appointment, or Separation

10 U.S.C. § 884

1. Summary of Proposal

This Report recommends no change to Article 84, except to redesignate it as Article 104b as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 104b as necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 84 prohibits servicemembers from assisting another in joining or leaving the military through false or fraudulent means.

3. Historical Background

Article 84 derived from Article of War 55 and Article for the Government of the Navy 19.[1] Article 84 first appeared in its current form in the UCMJ. Since the UCMJ was enacted in 1950,[2] the statute has remained unchanged.

4. Contemporary Practice

Article 84 (Unlawful enlistment, appointment, or separation) is a companion article to Article 83 (Fraudulent enlistment, appointment, or separation) and concerns the criminal liability of servicemembers who assist others in obtaining a fraudulent enlistment, appointment, or separation of officer or enlisted personnel.

The President, under Article 56, has prescribed the following maximum punishment for the offense of Unlawful enlistment, appointment, or separation: dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.[3]

5. Relationship to Federal Civilian Practice

Article 84 is a unique military offense with no direct federal civilian counterpart.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1225 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 251 (1951) (noting that Article 84 extended liability to fraudulently effecting the unlawful appointment of or separation of officers for the first time).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] MCM, Part IV, ¶8.e.

6. Recommendation and Justification

Recommendation 84: No change to Article 84, except to redesignate it as Article 104b.

In view of the well-developed case law addressing Article 84's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 84 (New Location) – Breach of Medical Quarantine
10 U.S.C. § 884

1. Summary of Proposal

This proposal would migrate the offense of breaking a medical quarantine currently addressed under Article 134 (the General Article)[1] into the newly re-designated Article 84 (Breach of Medical Quarantine). Part II of the Report will address changes in the Manual provisions implementing the new Article 84 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶100, the offense of breaking a medical quarantine requires a showing that a person who had been ordered into quarantine went beyond the limits of the quarantine before being released. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The concept of a medical quarantine is firmly rooted in nautical history: the word is derived from the Italian word "quaranta," which meant "forty," or the number of days that a ship suspected of containing diseased persons or animals would be isolated and detained before being permitted to make landfall.[2] The President first designated breaking a medical quarantine as an Article 134 offense in the 1951 MCM.[3]

4. Contemporary Practice

Each service empowers its installation commanders to declare medical quarantines in the event of a public health emergency.[4]

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[1] MCM, Part IV, ¶100.

[2] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSON & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.47[2] at 948 (2d ed. 2012).

[3] MCM 1951, App. 6c, ¶163.

[4] *See* U.S. DEP'T OF DEF. INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITH THE DEPARTMENT OF DEFENSE enclosure 3, ¶2(a) (dated 5 March 2010) (authorizing quarantine and isolation of individuals within the scope of the installation commander's authority in consultation with the Center for Disease Control designated "Quarantine Officer").

The President, under Article 56, has prescribed the following maximum punishment for the offense of breaching a medical quarantine: forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

42 U.S.C § 271 (Penalties for violation of quarantine laws) provides a similar offense to the offense of breaking a medical quarantine in Article 134.

6. Recommendation and Justification

Recommendation 134-100: Redesignate the offense of breaking a medical quarantine in Article 134 (MCM, Part IV, ¶100) as Article 84.

Migrating the offense of breaking medical quarantine to its own punitive article (newly redesignated Article 84, Breach of medical quarantine) locates the offense near similar "place of duty" offenses under the Code. Breach of a medical quarantine is recognized under federal criminal law and is also inherently prejudicial to good order and discipline. Accordingly, the offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1005. BREACH OF MEDICAL QUARANTINE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 883 (article 83 of the Uniform Code of Military Justice), as added by section 1004, the following new section (article):

[5] MCM, Part IV, ¶100.e.

"§884. Art. 84. Breach of medical quarantine

"Any person subject to this chapter—

"(1) who is ordered into medical quarantine by a person authorized to issue such order; and

"(2) who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1005 would migrate the offense of "Quarantine: medical, breaking" from Article 134, the General article, to redesignated Article 84 (Breach of medical quarantine). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 85 – Desertion
10 U.S.C. § 885

1. Summary of Proposal

This Report recommends no change to Article 85. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 85.

2. Summary of the Current Statute

Article 85 prohibits servicemembers from deserting or permanently quitting their military unit or branch of military service, or wrongfully absenting themselves to avoid hazardous duty; it also prohibits those who have not been regularly separated from enlisting or accepting an appointment in the same or another one of the armed forces without fully disclosing the fact that they have not been regularly separated; it also prohibits servicemembers from entering a foreign armed service without authority; it is punishable by death in time of war.

3. Historical Background

Desertion is one of the oldest military offenses, punishable under American military law since the 1775 Articles of War.[1] Article 85 was derived from Articles 28 and 58 of the 1948 Articles of War and Articles 4, 8, and 10 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Desertion: dishonorable discharge, forfeiture of all pay and allowances, and, depending on whether the absence was terminated by apprehension or with the intent to avoid hazardous duty, confinement for 2, 3, or 5 years, and, in time of war, death.[4]

5. Relationship to Federal Civilian Practice

Article 85 is a unique military offense with no direct federal civilian counterpart.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 636 (photo reprint 1920) (2d ed. 1896).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 605, 1225 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶9.e.

6. Recommendation and Justification

Recommendation 85: No change to Article 85.

In view of the well-developed case law addressing Article 85's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 86 – Absence Without Leave
10 U.S.C. § 886

1. Summary of Proposal

This Report recommends no change to Article 86. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 86.

2. Summary of the Current Statute

Article 86 prohibits servicemembers from, without authority, failing to go to their place of duty or temporarily absenting themselves from their place of duty.

3. Historical Background

Like desertion, "absence without leave" has been punishable under American military law since the 1775 Articles of War.[1] Article 86 was derived from Article 61 of the 1948 Articles of War and Articles 4 and 8 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Unlike Article 85 (desertion), Article 86 (absence without leave) punishes temporary, rather than permanent, absence. And unlike the offense of desertion, which requires a specific intent to remain away from the unit or service, the offense of absence without leave requires only the general intent to be absent.[4]

The President, under Article 56, has prescribed the following maximum punishments for the offense of Absence Without Leave, depending on the length of the absence and whether it was terminated by apprehension: dishonorable discharge, forfeiture of all pay and allowances, and confinement from 1 month to 18 months.[5]

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[1] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 107, 607, 636 (photo reprint 1920) (2d ed. 1896) (classifying "absence without leave" as a pure military offense, and explaining that different variations of "absence without leave" were chargeable under AW 31, 32, 33, 34, and 40 of 1874).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1225-26 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶10.c(2)(b); United States v. Holder, 22 C.M.R. 3, 6 (C.M.A. 1956).

[5] MCM, Part IV, ¶10.e.

5. Relationship to Federal Civilian Practice

Article 86 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 86: No change to Article 86.

In view of the well-developed case law addressing Article 86's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 87 – Missing Movement
10 U.S.C. § 887

1. Summary of Proposal

This proposal would migrate the offense of jumping from a vessel into the water currently addressed under Article 134 (the General Article)[1] into Article 87, retitling the statute as "Missing movement; jumping from vessel." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 87 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 87 prohibits servicemembers from, by neglect or design, missing the movement of a ship, aircraft, or unit with which they are required to move.

3. Historical Background

During World War II, the United States military experienced difficulties when members of units or crews failed to show up when their units or ships moved out. The offense of missing movement was created to address this issue. This offense was designed to address the gray area between the less egregious offense of AWOL in violation of Article 86 and the more serious offense of desertion in violation of Article 85.[2] Since the enactment of the UCMJ in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Article 87 (missing movement) is a companion to Article 85 (desertion) and Article 86 (absence without leave).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Missing Movement, depending on whether it was by design or neglect: dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 2 years.[4]

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[1] MCM, Part IV, ¶91. The offense of jumping from a vessel is discussed in this Report under "Article 134 – Jumping from a vessel – Addendum."

[2] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.6[2] at 253-54 (2d ed. 2012) (footnotes omitted); *see also Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 605, 1226 (1949) (noting that Article 87 is "in effect, an aggravated form of absence without leave").

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶11.e.

5. Relationship to Federal Civilian Practice

Article 87 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 87: Transfer the offense of jumping from a vessel into the water defined under Article 134, the General Article (MCM, Part IV, ¶¶107 & 91), to Article 87.

This change would align Missing Movement under Article 87 with jumping from a vessel into the water.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1006. MISSING MOVEMENT; JUMPING FROM VESSEL.

Section 887 of title 10, United States Code (article 87 of the Uniform Code of Military Justice), is amended to read as follows:

"§887. Art. 87. Missing movement; jumping from vessel

"(a) MISSING MOVEMENT.—Any person subject to this chapter who, through neglect or design, misses the movement of a ship, aircraft, or unit with which the person is required in the course of duty to move shall be punished as a court-martial may direct.

"(b) JUMPING FROM VESSEL INTO THE WATER.—Any person subject to this chapter who wrongfully and intentionally jumps into the water from a vessel in use by the armed forces shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1006 would consolidate the offenses of "Missing movement" in existing Article 87 and "Jumping from vessel into the water" in Article 134 (the General article) into a single offense under Article 87 (Missing movement; jumping from vessel). The consolidated offense would prohibit servicemembers from, by neglect or design, missing the movement of a ship, aircraft, or unit with which they are required to move or jumping from a vessel into the water. These offenses are well-recognized concepts in military criminal law. Accordingly, they do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 87 – Missing Movement; Jumping from Vessel – Addendum

(Jumping from Vessel into the Water)

1. Summary of Proposal

This proposal would migrate the offense of jumping from a vessel into the water currently addressed under Article 134 (the General Article)[1] into Article 87 (Missing Movement; Jumping from Vessel). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶91, the offense prohibits servicemembers from engaging in such conduct when it is wrongful and intentional. Because the offense falls under Article 134, the prosecution also must prove the conduct was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated jumping from a vessel into the water as an Article 134 offense in the 1984 MCM[2], although a conviction for this offense under Article 134 had been affirmed as early as 1964.[3] The offense is designed to target the dangerous and disruptive practice of individuals intentionally jumping from vessels in use by the Armed Forces, thereby endangering the safe operation of military vessels, their own lives, and the lives of would-be rescuers.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Jumping from a Vessel into the Water: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[5]

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[1] MCM, Part IV, ¶91.

[2] MCM 1984, App. 23, ¶91.

[3] United States v. Sandinsky, 34 C.M.R. 343, 346 (C.M.A. 1964) (appellant's conviction under Article 134 for jumping off of the aircraft carrier on which he served into the sea upheld).

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.36[2] at 80 (2d ed. 2012).

[5] MCM, Part IV, ¶91.e.

5. Relationship to Federal Civilian Practice

The offense of jumping from a vessel into the water is a unique military offense with no direct counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 134-91: Migrate the offense of jumping from a vessel into the water in Article 134 (MCM, Part IV, ¶92) to Article 87.

Migrating the offense of jumping from a vessel into the water to Article 87 (Missing Movement) aligns the offense with the other similar subject matter offenses under the UCMJ. Intentional, wrongful jumping into the sea from a vessel is inherently prejudicial to good order and discipline as it needlessly disrupts operations and possibly endangers military lives and property in follow-on rescue efforts. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 87 (Missing movement; jumping from vessel), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 87 (Missing movement; jumping from vessel), *supra*, at paragraph 9.

Article 87b (New Provision) – Offenses against Correctional Custody and Restriction

(Restriction, breaking)

10 U.S.C. § 887b

1. Summary of Proposal

This proposal would migrate the offense of breaking restriction currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 87b (Offenses against correctional custody and restriction). Part II of the Report will address changes to the Manual for Courts-Martial provisions implementing the new Article 87b (Offenses against correctional custody and restriction).

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶70, the offense requires a showing that the accused went beyond the limits of the restriction in which he had been placed. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized restriction breaking since the 1921 MCM.[2] Under the UCMJ, the President designated restriction breaking as an Article 134 offense in the 1951 MCM.[3]

4. Contemporary Practice

Restriction is a form of moral restraint imposed by an order directing a person to remain within certain specified limits.[4] Servicemembers may be placed in restriction in lieu of arrest while awaiting trial by court-martial as an authorized punishment imposed via Article 15 nonjudicial punishment; or by the sentence of a court-martial.[5] Restriction can

[1] MCM, Part IV, ¶102.

[2] MCM 1921, ¶44 (permitting "restriction to limits" as a court-martial punishment), ¶¶310, 311.

[3] MCM 1951, App. 6c, ¶165.

[4] MCM, Part IV, ¶102.c.

[5] R.C.M. 304(2) (pretrial restriction); MCM, Part V, ¶5(c)(2) (nonjudicial punishment restriction); R.C.M. 1003(b)(6) (court-martial punishment restriction).

also be imposed for reasons unrelated to military justice, "in the interests of training, operations, security, or safety."[6]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Breaking Restriction: forfeiture of two-thirds pay per month for 1 month and confinement for 1 month.[7]

5. Relationship to Federal Civilian Practice

Breaking restriction is a unique military offense with no direct counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 134-102: Migrate the offense of breaking restriction in Article 134 (MCM, Part IV, ¶102) to Article 87b.

Migrating the restriction breaking offense to Article 87b aligns the offense with other similar subject matter offenses under the UCMJ involving violations of various forms of custody. Breaking restriction involves a direct flouting of command authority and thus is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

8. Legislative Proposal

SEC. 1007. OFFENSES AGAINST CORRECTIONAL CUSTODY AND RESTRICTION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 887a (article 87a of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(2), the following new section (article):

[6] MCM, Part IV, ¶102.c.

[7] MCM, Part IV, ¶102.e.

"§887b. Art. 87b. Offenses against correctional custody and restriction

"(a) ESCAPE FROM CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under physical restraint; and

"(3) who escapes from the physical restraint before being released from the physical restraint by proper authority;

shall be punished as a court-martial may direct.

"(b) BREACH OF CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under restraint other than physical restraint; and

"(3) who goes beyond the limits of the restraint before being released from the correctional custody or relieved of the restraint by proper authority;

shall be punished as a court-martial may direct.

"(c) BREACH OF RESTRICTION.—Any person subject to this chapter—

"(1) who is ordered to be restricted to certain limits by a person authorized to do so; and

"(2) who, with knowledge of the limits of the restriction, goes beyond those limits before being released by proper authority;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1007 would migrate and consolidate the offenses of "Restriction, breaking" and Correctional custody – offenses against" from Article 134 (the General article) to a new section, Article 87b (Offenses against correctional custody and restriction). These offenses are well-recognized concepts in criminal law. Accordingly, they do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.[8]

[8] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 87b (New Provision - Addendum) – Offenses against Correctional Custody and Restriction

(Correctional Custody – Offenses Against)

1. Summary of Proposal

This proposal would migrate the offense of "Correctional custody—offenses against" currently addressed under Article 134 (the General Article)[1] to Article 87b (Offenses against correctional custody and restriction). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 87b necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶70, the offense requires a showing that the accused escaped from correctional custody or breached a restraint while in correctional custody. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Correctional custody first came into existence in 1962 as a form of nonjudicial punishment imposed under Article 15, UCMJ.[2] The Court of Military Appeals first recognized breach of correctional custody as an Article 134 offense in 1965.[3] Thereafter, the President designated it as an Article 134 offense in the 1968 MCM.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the Offenses Against Correctional Custody: for escape, dishonorable discharge, forfeiture of

[1] MCM, Part IV, ¶70.

[2] Act of Sep. 7, 1962, Pub. L. No. 87-648, § 1, 76 Stat 447, 448 (1962).

[3] United States v. Carson, 35 C.M.R. 379, 381 (C.M.A. 1965).

[4] MCM 1969, App. 6c, ¶135.

all pay and allowances, and confinement for 1 year; for a breach of custody, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

The offenses against correctional custody are unique military offenses, with no counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 134-70: Migrate the offenses against correctional custody in Article 134 (MCM, Part IV, ¶70) to Article 87b.

Migrating the correctional custody offenses to Article 87b logically aligns the offense with existing UCMJ "custody" breaking offenses.[6] Correctional custody offenses are not reliant on the terminal elements of Article 134 as the act is inherently prejudicial to good order and discipline.[7]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See 87b (Offenses against Correctional Custody and Restriction), *supra*, at paragraph 8.

9. Sectional Analysis

See 87b (Offenses against Correctional Custody and Restriction), *supra*, at paragraph 9.

[5] MCM, Part IV, ¶70.e.

[6] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

[7] "The act itself, occurring in direct violation of a lawful punishment is prejudicial to good order and discipline; it tears at the foundation of moral authority that undergirds all lawful orders." DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSON & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.15[3][b][i], [ii] at 783 (2d ed. 2012).

Article 88 – Contempt toward Officials
10 U.S.C. § 888

1. Summary of Proposal

This Report recommends no change to Article 88. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 88.

2. Summary of the Current Statute

Article 88 prohibits an officer from using contemptuous words towards certain government officials: the President, the Vice President, Congress, the Secretary of Defense, the Secretary of any military department, the Secretary of Homeland Security, or the governor or legislature of any State, Commonwealth, or possession in which the officer is on duty or present.

3. Historical Background

American military law has criminalized contemptuous words towards public officials by servicemembers since the 1775 Articles of War.[1] Historically, the Articles of War criminalized contemptuous words toward public officials by officer and enlisted personnel alike.[2] The current Article 88 was derived from Article 62 of the 1920 Articles of War, however, Article 88 applies the offense to commissioned officers only.[3] Since the enactment of the UCMJ in 1950,[4] Article 88 has remained virtually unchanged.

4. Contemporary Practice

There has only been one reported appellate case for a violation of Article 88,[5] although there have been many non-judicial proceedings and adverse administrative actions based on Article 88.[6]

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 953-54 (photo reprint 1920) (2d ed. 1896).

[2] *Id*. at 565 (citing AW 19 of 1874).

[3] AW 62 of 1920; *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 823, 1226 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] United Stated v. Howe, 37 C.M.R. 429, 433, 438, 447 (C.M.A. 1967) (affirming conviction for use contemptuous words against President Lyndon B. Johnson).

[6] DAVID A. SCHLUETER, ET AL., MILITARY CRIMES AND DEFENSES § 5.7[2] n. 339-40 (2d ed. 2012).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Contempt toward Officials: dismissal, forfeiture of all pay and allowances, and confinement for 1 year.

5. Relationship to Federal Civilian Practice

Article 88 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 88: No change to Article 88.

In view of the well-developed case law addressing Article 88's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

Article 89 – Disrespect Toward a Superior Commissioned Officer
10 U.S.C. § 889

1. Summary of Proposal

This would amend Article 89 by transferring the offense of assaulting a superior commissioned officer, currently under Article 90 (MCM, Part IV, ¶14), to Article 89 (Disrespect toward superior commissioned officer; assault of superior commissioned officer).[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 89 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 89 prohibits servicemembers from engaging in disrespectful behavior toward a superior commissioned officer.

3. Historical Background

American military law has criminalized assaults against superior commissioned officers since the Revolutionary War.[2] The current Article 89 was derived from Article 63 of the 1948 Articles of War and Article 8 of the 1930 Articles for the Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

Under Article 89, the term "superior commissioned officer" means someone within the same armed service as the accused who is a commissioned officer superior in grade to the accused, or superior in command to the accused.[5]

When the accused and the victim are members of different armed services, the superior commissioned officer must also be in the accused's chain of command or, except for

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[1] The offense of assaulting a superior commissioned officer is discussed in this Report under "Article 90 – Assaulting a Superior Commissioned Officer."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 565-66 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 256 (1951) (noting Article 89 was a consolidation of existing Army and Navy practice).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶13.c(1)(a) (noting that an officer who is "superior in command" may still qualify as a superior commissioned officer even over an officer who is otherwise "superior in grade").

medical officers or chaplains, the superior commissioned officer and the accused must both be detained by a hostile entity.[6]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Disrespect toward a Superior Commissioned Officer: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.[7]

5. Relationship to Federal Civilian Practice

Article 89 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 89: Amend Article 89 by transfering "assaulting a superior commissioned officer" from Article 90 to Article 89.

This proposal would align similar offenses under Article 89 with technical amendments.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment .

8. Legislative Proposal

SEC. 1008. DISRESPECT TOWARD SUPERIOR COMMISSIONED OFFICER; ASSAULT OF SUPERIOR COMMISSIONED OFFICER.

Section 889 of title 10, United States Code (article 89 of the Uniform Code of Military Justice), is amended to read as follows:

[6] *Id.* at ¶13.c(1)(b).

[7] *Id.* at ¶13.e.

"§889. Art. 89. Disrespect toward superior commissioned officer; assault of superior commissioned officer

"(a) DISRESPECT.—Any person subject to this chapter who behaves with disrespect toward that person's superior commissioned officer shall be punished as a court-martial may direct.

"(b) ASSAULT.—Any person subject to this chapter who strikes that person's superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer's office shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

9. Sectional Analysis

Section 1008 would amend Article 89 and retitle the statute as "Disrespect toward superior commissioned officer; assault of superior commissioned officer." As amended, Article 89 would include the offense of "Assaulting a superior commissioned officer," which would be transferred from Article 90. This change would align these closely related provisions in Articles 89.

Article 90 (Current Law) – Assaulting or Willfully Disobeying Superior Commissioned Officer
10 U.S.C. § 890

1. Summary of Proposal

This proposal would amend Article 90 by transferring the offense of assaulting a superior commission officer, currently included in Article 90, to Article 89 in order to consolidate factually similar offenses.[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 90 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 90 prohibits servicemembers from both striking and disobeying a superior commissioned officer. In time of war, the offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized assaulting and disobeying superior commissioned officers since the Revolutionary War.[2] The current Article 90 was derived from Article 64 of the 1948 Articles of War and Article 4 of the 1930 Articles for the Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

Under Article 90, the term "superior commissioned officer" means someone within the same armed service as the accused who is a commissioned officer superior in grade to the accused, or superior in command to the accused, regardless of rank.[5]

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[1] The offenses to be realigned are also discussed in the Report under "Article 89 – Disrespect Toward a Superior Commissioned Officer."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 569 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 256-57 (1951) (noting Article 90 was a consolidation of existing Army and Navy practice).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶14.c(1)(a)(i) (citing ¶13.c(1)(a), (b)).

When the accused and the victim are members of different armed services, the superior commissioned officer must also be in the accused's chain of command or, except for medical officers or chaplains, the superior commissioned officer and the accused must both be detained by a hostile entity.[6]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Assaulting or Willfully Disobeying a Superior Commissioned Officer: if in time of war, by death; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 10 years (for assault), or for up to 5 years (for disobedience)[7]

5. Relationship to Federal Civilian Practice

Article 90 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 90: Amend Article 90 to transfer the offense of "assaulting a superior commissioned officer" to Article 89.

This proposal would align similar offenses under Article 89 and amend the statute to use gender-neutral terms.

Part II of the Report will address the definition of "superior commissioned officer" when the accused and victim are in different uniformed services.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1009. WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER.

Section 890 of title 10, United States Code (article 90 of the Uniform Code of Military Justice), is amended to read as follows:

[6] *Id.*

[7] *Id.* at ¶14.e.

"§890. Art. 90. Willfully disobeying superior commissioned officer

"Any person subject to this chapter who willfully disobeys a lawful command of that person's superior commissioned officer shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

9. Sectional Analysis

Section 1009 would amend Article 90 by transferring the offense of "Assaulting a superior commissioned officer" to Article 89 and retitling the statute as "Willfully disobeying superior commissioned officer." This change would realign closely related provisions in Articles 89 and focus the Article as amended on the willful disobedience of a lawful command of a superior commissioned officer.

Article 91 – Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or Petty Officer

10 U.S.C. § 891

1. Summary of Proposal

This Report recommends no change to Article 91. Part II of the Report will address any changes that may be needed to the Manual for Courts-Martial provisions implementing Article 91.

2. Summary of the Current Statute

Article 91 prohibits enlisted servicemembers and warrant officers from assaulting, disobeying, or disrespecting warrant, noncommissioned, or petty officers in the execution of their office.

3. Historical Background

American military law has criminalized disrespectful behavior towards superior noncommissioned officers since the 1806 Articles of War.[1] The current Article 91 was derived from Article 65 of the 1948 Articles of War and Article 4 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Unlike Articles 89 and 90 (which punish similar conduct toward superior commissioned officers), Article 91 does not require a superior-subordinate relationship.[4]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or

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[1] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 722, 726, 732 (photo reprint 1920) (2d ed. 1896). ("noting that "all such insubordination; disrespectful or insulting language or behaviour [sic] towards superiors . . . in rank" was punishable under the "General Article" (then AW 64 of 1874), and specifically including "Any insubordinate, drunken, or disorderly conduct, resistance to arrest, violence toward a non-commissioned officer or soldier.").

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM Part IV, ¶15.c.(1).

Petty Officer: dishonorable discharge, forfeiture of all pay and allowances, and, depending of the specifics of the underlying offense, confinement for 3 months to 5 years.[5]

5. Relationship to Federal Civilian Practice

Article 91 is a unique military offense with no direct federal civilian counterpart. There are, however, federal statutes that prohibit encouraging insubordination or disloyalty among the armed forces.[6]

6. Recommendation and Justification

Recommendation 91: No change to Article 91.

In view of the well-developed case law addressing Article 91's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] *Id.* at ¶15.e.

[6] 18 U.S.C. § 2387.

Article 92 – Failure to Obey Order or Regulation
10 U.S.C. § 892

1. Summary of Proposal

This Report recommends no change to Article 92. Part II of the Report will address any changes that may be needed to the Manual for Courts-Martial provisions implementing Article 92.

2. Summary of the Current Statute

Article 92 prohibits violations of a general order or regulation; violations of "other lawful orders"; and dereliction of military duties.

General orders or regulations are those published by the President, the Secretary of Defense, the Secretary of Homeland Security (for the Coast Guard), the service secretaries of the various military departments, general court-martial convening authorities, and general and flag officers in command.[1] "Other lawful orders" include "local orders" whose violations are not prohibited by Article 90(2), 91, or 92(1).[2] Military duties may be created by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.[3] For instance, Article 92 has been used to address violations of the international law of armed conflict and the failure to report such violations.[4]

3. Historical Background

Concern for disobedience to orders and derelictions of duty are as old as the military itself and violations were typically prosecuted under the "General Article" of the Articles of War.[5] Article 92 was derived from Article 96 (the "general article") of the 1948 Articles of War

[1] MCM, Part IV, ¶16.c.(1)(a).

[2] MCM, Part IV, ¶16.c.(2) & ¶14.c.(2).

[3] MCM, Part IV, ¶16.c.(3).

[4] *See generally* DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES (2013), Appendix V, 152-181 (recounting courts-martial involving alleged Law of Armed Conflict violations or failure to report alleged LOAC violations by servicemembers during Operations Enduring Freedom and Iraqi Freedom).

[5] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 567, 571, 725 (photo reprint 1920) (2d ed. 1896) (citing AW 21 and 62 of 1874).

and Article 9 of the 1930 Articles for the Government of the Navy.[6] The statute has remained unchanged since the UCMJ was enacted in 1950.

4. Contemporary Practice

Article 92 covers a broad range of orders and duties. An order is presumed lawful.[7] However, this is a rebuttable presumption determined as a matter of law by the military judge.[8]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Failure to Obey Order or Regulation: Dishonorable discharge, forfeiture of all pay and allowances, and, depending on the violation and whether it was willful or through neglect, confinement for 3 months to 2 years.[9]

5. Relationship to Federal Civilian Practice

Article 92 is a unique military offense with no direct federal civilian counterpart.

In civilian employment practice, misconduct is typically addressed through administrative or employment related proceedings.[10]

6. Recommendation and Justification

Recommendation 92: No change to Article 92.

In view of the well-developed case law addressing Article 92's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

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[6] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949).

[7] MCM, pt. IV, ¶14.c(2)(a); 16.c(1)(c).

[8] *New*, 55 M.J. at 104-05 (military judge did not err in deciding issue of lawfulness of order without submitting it to the members, as lawfulness of the order was not an element of the offense, but a question of law).

[9] MCM, Part IV, ¶16.e.

[10] *See, e.g.,* 5 C.F.R. § 752.603 (2014) (Federal agencies may take adverse administrative action against an employee for "reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.").

Article 93 – Cruelty and Maltreatment
10 U.S.C. § 893

1. Summary of Proposal

This Report recommends no change to Article 93. Part II of the Report will consider whether any changes are needed to the provisions in the Manual for Courts-Martial implementing Article 93.

2. Summary of the Current Statute

Article 93 prohibits abuses of authority by superior ranking military members over persons subject to their orders. Misconduct includes assaults on subordinates, imposing improper punishments, and sexual harassment.[1] The alleged physical or mental maltreatment must satisfy an objective standard, which involves ascertaining whether the conduct reasonably could have caused physical or mental harm or suffering.[2] The imposition of legitimate military duties does not constitute this offense, regardless of whether those duties are arduous, hazardous, or both.[3]

3. Historical Background

American military law has criminalized maltreatment of a subordinate by a superior since the nineteenth century.[4] The current Article 93 was derived from Article 96 (the "general article") of the 1948 Articles of War, and Article 8 of the 1930 Articles for the Government of the Navy.[5] Since the UCMJ was enacted in 1950,[6] the statute has remained unchanged.

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[1] MCM, Part IV, ¶17.c(2).

[2] *Id.*; *see also* United States v. Carson, 57 M.J. 410, 415 (C.A.A.F. 2002) (a higher ranking sergeant's indecent exposure of his genitalia to his subordinate female constituted maltreatment).

[3] *See* DAVID A. SCHLUETER ET AL, MILITARY CRIMES AND DEFENSES § 5.12[2] (2d ed. 2012).

[4] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 727 (photo reprint 1920) (2d ed. 1896) (noting "abuse of authority in assaulting or punishing inferiors" as misconduct punishable under the "general article" (then AW 62 of 1874)).

[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226-27 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 259 (1951).

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The essence of the offense is abuse of authority.[7] In practice, there is considerable overlap between misconduct addressed by both Article 93 (Cruelty and Maltreatment) and Article 92 (Failure to Obey Order or Regulation). Although Article 93 addresses a wide range of potential misconduct, each service also has published punitive orders and regulations addressing specific misconduct, such as hazing, sexual harassment, and inappropriate sexual acts between recruiters and recruits and between trainers and trainees.

The President, under Article 56, has prescribed the following maximum punishment for the offense of Cruelty and Maltreatment: dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.[8] By contrast, the maximum punishment for a violation of Article 92 (Failure to Obey Order or Regulation) is 2 years.[9]

5. Relationship to Federal Civilian Practice

Article 93 is a unique military offense with no direct federal civilian counterpart. 18 U.S.C. § 2191 (Cruelty to Seamen) is the closest federal civilian equivalent offense to maltreatment; in practice it has been used primarily to establish tort liability in maltreatment cases in federal civil disputes.[10]

6. Recommendation and Justification

Recommendation 93: No change to Article 93.

In view of the well-developed case law addressing Article 93's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the GC Terms of Reference and MJRG Operational Guidance by preserving a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

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[7] *Carson*, 57 M.J. at 415; *see, e.g.,* United States v. Bright, 66 M.J. 359, 366 (C.A.A.F. 2008) (affirming maltreatment conviction, where the accused drill instructor threatened to impose extra duties and fatigue details on the training platoon if she did not have sex with him).

[8] MCM, Part IV, ¶17.e.

[9] *Id.* at ¶16.e.

[10] *See, e.g.,* Stewart v. Moore, 334 F. Supp. 396, 397-398 (S.D. TX) (Plaintiff relying on 18 U.S.C. § 2191 as source of "duty of care"); Fowler v. American Mail Line, Ltd, 69 F.2d 905, 906 (9th Cir. 1934) (same, relying upon prior codification at 46 U.S.C. § 712).

Article 93a – Prohibited Activities with Military Recruit or Trainee by Person in Position of Special Trust

10 U.S.C. § 893a

1. Summary of Proposal

This proposal would add a new provision, Article 93a, to the UCMJ. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 93a.

2. Summary of the Current Statute

The proposed statute has not yet been enacted.

3. Historical Background

The existing Article 93 (Cruelty and Maltreatment) prohibits conduct that would be an "abuse of authority" by superior ranking military members toward persons subject to their orders. Under current law, however, a consensual sexual relationship between a subordinate and a superior, without more, does not constitute "maltreatment."[1]

The 2014 National Defense Authorization Act, § 1741 ("Enhanced Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training"), directed the DoD to take the following actions:

§ 1741(a): maintain policies defining and proscribing inappropriate and prohibited relationships, communications, conduct, and contact (including consensual interactions) between recruits and trainees and their respective recruiters and trainers;

§ 1741(b): ensure any military member engaging in conduct referenced in 1741 (a) be subject to prosecution.

According to the Report on Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training (May 2014), "statutes and regulations are in place to hold offenders appropriately accountable when prospective and new members of the military are victimized by servicemembers who exercise control over them."[2]

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[1] *See, e.g.*, United States v. Fuller, 54 M.J. 107, 110-11 (C.A.A.F. 2000) (holding that E-3's voluntary sexual acts with her E-5 training cadre did not constitute maltreatment).

[2] DEP'T OF DEFENSE, REPORT ON PROTECTIONS FOR PROSPECTIVE MEMBERS AND NEW MEMBERS OF THE ARMED FORCES DURING ENTRY-LEVEL PROCESSING AND TRAINING 1, 12-13 (May 2014).

4. Contemporary Practice

Currently, all of the services prohibit by regulation sexual relations between recruiters and recruits, and trainers and trainees.[3] Accordingly, prohibited sexual relations can be punished under Article 92 (Failure to Obey Order or Regulation) with confinement for 2 years.

5. Relationship to Federal Civilian Practice

Federal law criminalizes sexual acts between prison guards and prisoners in a federal prison.[4] A conviction for this offense requires sex offender registration.[5]

Thirty states criminalize sexual relations between teachers and students,[6] with seven states prohibiting sex even if the student is over the age of 18.[7] In all 30 states, a conviction for this offense requires sex offender registration.

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[3] ***Air Force***: Air Force Instruction (AFI) 36-2909, *Professional and Unprofessional Relationships* (1 May 1999), para. 2.2; Air Education and Training Command (AETC) Supplement, AFI 36-2909, *Recruiting Education, and Training Standards of Conduct* (2 December 2013), para. 2.3.2, 2.3.3. ***Army:*** Army Training and Doctrine Command (TRADOC) Regulation 350-6, *Enlisted Initial Entry Training Policies and Administration,* para. 2-6; US Army Recruiting Command (USARC) Regulation 600-25, *Prohibited and Regulated Activities,* Ch. 2*;* Army Regulation (AR) 600-20*, Army Command Policy*, para. 4-14. ***Coast Guard:*** COMDTINST. M1600.2 (series) and ALCOAST 417/13 (301909Z SEP 13)) prohibits romantic relationships between instructors and recent graduates of recruit training for a period of one year after graduation. ***Marines***: Navy Regulations § 1165 (1990); Marine Corps Recruit Depot (MCRD) Paris Island Depot Order 1100.5B; MCRD San Diego Depot Order 1100.4B; Marine Corps Training Command General Oder 01-03; Marine Corps Order 1510.32F. ***Navy:*** Navy Regulations § 1165 (1990); Chief of Naval Operations Instruction (OPNAVINST) 5370.2C (26 April 2007); Navy Recruit Training Command Instructions (NACCRUITRACOMINST) 1600.3 (19 March 2013); NAVCRUITRACOMINST 5370.3 (29 May 2013); Commander, Navy Recruiting Command Instruction (COMNAVCUITCOM) 5370.1F (12 October 2011); Judge Advocate General Instruction (JAGINST) 5370 (6 December 2010); Commandant of the United States Naval Academy Instruction (COMDTMININST) 5400.6Q.

[4] 18 U.S.C. §§ 2243 & 2244.

[5] 42 U.S.C. § 16911(3)(A)(ii); (4)(A)(ii). 18 U.S.C. § 2243 is a Tier II offense (25-year registration); 18 U.S.C. § 2244 is a Tier III offense (15-year registration).

[6] ***Alabama***: AL CODE 13A-6-81; 13A-6-82; ***Alaska***: ALASKA STAT. § 11.41.434(a)(3)(B); ***Arkansas***: ARK CODE ANN. 5-14-125(a)(6); 5-14-126(a)(1)(C); ***California***: WEST'S ANN. CAL. PENAL CODE § 261.5; ***Colorado***: COL REV. STAT. 18-3-405.3; ***Connecticut:*** CT GEN STAT § 53a-71; ***Delaware***: 11 DEL. CODE ANN. § 761, 770-773; ***Florida***: FL. CODE ANN. § 775.0862; ***Illinois***: 720 Ill. Comp. Stat. 5/11-9.2 (2001); ***Iowa:*** IOWA CODE ANN. § 709.15; ***Kansas***: KANS. STAT. ANN. § 21-3520; ***Maryland:*** MD. CODE § 3-308; ***Michigan:*** Mich. Comp. Laws Ann. 750.520b; ***Minnesota:*** Minn. Stat. Ann. 609.344(1); ***Maine:*** 17-A MAINE REV. STAT. ANN. § 255-A; **Massachusetts**: MASS. GEN. LAWS ANN. § 23A; ***Montana***: MONTANA CODE ANN. 45-5-502(5)(a)(iii), (iv); ***New Hampshire***: N.H. REV. STAT. § 632-A:3; ***New Jersey:*** N.J. REV. STAT. § 2C 14-2***; New York:*** NY PENAL LAW, § 130.25; ***North Carolina:*** N.C. GEN. STAT. ANN. § 14-27.7; 14-202.4(a); ***Oklahoma:*** 21 OKLA. STAT. ANN. § 1111, 1114; ***Ohio:*** OHIO REV. CODE § 2907.03; 2907.05(A)(1)-(3), (5); 2907.07***; South Carolina:*** SC CODE § 16-3-755; ***Tennessee***: TENN. CODE ANN. § 39-13-527; ***Texas:*** TX PENAL CODE § 21.12; ***Utah:*** U.C.A. § 76-5-413; ***Virginia:*** VA CODE ANN. § 18.2-64.1, 18-2.370.1; ***Vermont:*** 13 VT. REV. STAT. ANN. §3252; ***Washington:*** WASH. REV. CODE § 9A.44.093; § 9A.44.096; ***Wisconsin:*** W.S.A. 948.095(b).

6. Recommendation and Justification

Recommendation 93a: Enact new Article 93a.

This proposal provides enhanced accountability for sexual misconduct committed by recruiters and trainers in the recruiting and basic military training environments.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by enacting a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

The Judicial Proceedings Panel decided to study whether Article 120 should provide for a strict liability offense (which necessarily would qualify as a sex offender registration offense) or whether non-Art. 120 offenses would be appropriate for this misconduct, and if so, whether they should be sex offender registration offenses.[8]

8. Legislative Proposal

SEC. 1010. PROHIBITED ACTIVITIES WITH MILITARY RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 893 (article 93 of the Uniform Code of Military Justice), the following new section (article):

"**§893a. Art. 93a. Prohibited activities with military recruit or trainee by person in position of special trust**

"(a) ABUSE OF TRAINING LEADERSHIP POSITION.—Any person subject to this chapter—

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[7] Those seven states include ***Alabama*** (19 years old); ***Arkansas*** (21 years old); ***Connecticut*** (high school students); ***Michigan*** (high school students over 18 years old); ***North Carolina***; ***Washington*** (students over 18, but teacher must be at least 5 years older); ***Utah*** (persons under the age of 21 receiving state services).

[8] JUDICIAL PROCEEDINGS PANEL—INITIAL REPORT 15, 37-43 (February 4, 2015), ("[T]he 2012 version of Article 120 does not sufficiently criminalize sexual relationships between senior and subordinates when force or the threat of force is not overt.").

"(1) who is an officer, a noncommissioned officer, or a petty officer;

"(2) who is in a training leadership position with respect to a specially protected junior member of the armed forces; and

"(3) who engages in prohibited sexual activity with such specially protected junior member of the armed forces;

shall be punished as a court-martial may direct.

"(b) ABUSE OF POSITION AS MILITARY RECRUITER.—Any person subject to this chapter—

"(1) who is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or

"(2) who is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the armed forces who is enlisted under a delayed entry program;

shall be punished as a court-martial may direct.

"(c) CONSENT.—Consent is not a defense for any conduct at issue in a prosecution under this section (article).

"(d) DEFINITIONS.—In this section (article):

"(1) SPECIALLY PROTECTED JUNIOR MEMBER OF THE ARMED FORCES.—The term 'specially protected junior member of the armed forces' means—

"(A) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

"(B) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

"(C) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

"(2) TRAINING LEADERSHIP POSITION.—The term 'training leadership position' means, with respect to a specially protected junior member of the armed forces, any of the following:

"(A) Any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

"(B) Faculty and staff of the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

"(3) APPLICANT FOR MILITARY SERVICE.—The term 'applicant for military service' means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.

"(4) PROHIBITED SEXUAL ACTIVITY.—The term 'prohibited sexual activity' means, as specified in regulations prescribed by the Secretary concerned, inappropriate physical intimacy under circumstances described in such regulations.".

9. Sectional Analysis

Section 1010 would create a new section, Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust). The new section would provide enhanced accountability for sexual misconduct committed by recruiters and trainers during the various phases within the recruiting and basic military training environments. The term "officer" as used in subsection (a)(1) of this statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). The term "applicant for military service" would include persons in the process of applying for an original enlistment or appointment in the armed services as defined in applicable service regulations. The primary focus of the new statute is on recruiting and initial entry training. Because of the unique nature of military training and the different training environments among the services, the statute would authorize the Service Secretaries to publish regulations designating the types of physical intimacy that would constitute a "prohibited sexual activity" under subsections (a) and (b) of the new statute.

Article 93a would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense.

Article 93a is intended to address specific conduct and is not intended to supersede or preempt service regulations governing professional conduct by staff involved in recruiting, entry level training, or other follow on training programs. The Secretary concerned could prescribe by regulation any additional initial career qualification training programs related to servicemembers they determine should fall under this statute. Implementing rules will address appropriate maximum punishments for the new offense.

Article 94 – Mutiny or Sedition
10 U.S.C. § 894

1. Summary of Proposal

This Report recommends no change to Article 94. Part II of the Report will address any changes needed to the Manual for Courts-Martial provisions implementing Article 94.

2. Summary of the Current Statute

Article 94 prohibits mutiny and sedition, and prohibits officers from failing to do their utmost to suppress them. Mutiny is the usurping or overriding of lawful military authority. Sedition is the overthrow or destruction of lawful civil authority. The offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized mutiny and sedition since the Revolutionary War.[1] Article 94 was derived from Articles 66 and 67 of the 1948 Articles of War and from Articles 4 and 8 from the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for all offenses under Article 94: death.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 2383 (Rebellion or insurrection), 2384 (Seditious conspiracy), 2385 Advocating overthrow of Government), 2387 (Activities affecting armed forces generally), and 2388 (Activities affecting armed forces during war) set forth similar offenses to Article 94.

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[1] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 578 (photo reprint 1920) (2d ed. 1896) (discussing the origin of mutiny and sedition under the British Articles of War, and General George Washington's adaptation of the British Model under the Articles of War for the Continental Army) (footnotes omitted).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 259-60 (1951) (analyzing how the UCMJ "mutiny provision" departed from the former Navy definition).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶18.e.

6. Recommendation and Justification

Recommendation 94: No change to Article 94.

In view of the well-developed case law addressing Article 94's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 95 (Current Law) – Resistance, Flight, Breach of Arrest, and Escape
10 U.S.C. § 895

1. Summary of Proposal

This Report recommends no change to Article 95, except to redesignate it as Article 87a as part of the realignment of the punitive articles. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 87a.

2. Summary of the Current Statute

Article 95 prohibits resisting arrest or apprehension, fleeing apprehension, breaking arrest, and escaping from custody or confinement.

3. Historical Background

Article 95 was derived from Article 69 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[1] Since the UCMJ was enacted in 1950,[2] the statute has been amended only once, to insert the word "flight."[3]

4. Contemporary Practice

Military apprehension is the same as civil arrest,[4] and military arrest is the same as restriction to specified limits.[5]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 260 (1951).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] NDAA FY 1996, Pub. L. No. 104-106, Div. A, Title XI, § 1112(a), 110 Stat. 186, 461 (1996). Note, until 1996, military courts held that escape from apprehension (military arrest) was not resisting apprehension under Article 95. *See* United States v. Burgess, 32 M.J. 446, 447-48 (C.M.A. 1991) (holding accused's flight from attempted apprehension, when he ignored military policeman's order to stop and drove away in car, was not kind of "active resistance" needed to support conviction for resisting apprehension). Congress amended the statute in 1996 to expressly include "flight" from apprehension as an offense. *See* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.14[2] at 324 (2d ed. 2012).

[4] R.C.M. 302(a)(1) (Discussion).

[5] R.C.M. 304(a)(3) (noting military personnel under "arrest" are not permitted to perform full military duties).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Resistance, Flight, Breach of Arrest, and Escape: dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 751-58 applies to offenses similar to Article 95, prohibiting escape, attempts to escape, or assisting escape from custody of the Attorney General or his or her representatives.

6. Recommendation and Justification

Recommendation 95: No change to Article 95, except to redesignate it as Article 87a.

In view of the well-developed case law addressing Article 95's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal is consistent with the GC Terms of Reference directive to conduct a comprehensive review of the military justice system.

[6] MCM, Part IV, ¶19.e.

Article 95 (New Location) – Offenses by Sentinel or Lookout
10 U.S.C. § 895

1. Summary of Proposal

This proposal would migrate the loitering portion of offenses against or by sentinel or lookout, which is currently addressed under Article 134 (the General Article),[1] to the new Article 95 (Offenses by sentinel or lookout). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶104, the offense prohibits misconduct toward or by sentinel or lookout not addressed in Article 113, Misbehavior of Sentinel or Lookout. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated offenses against or by a sentinel or lookout under Article 134 in the 1951 MCM.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Offenses Against or By Sentinel or Lookout. If a sentinel or lookout wrongfully loiters or sits upon a post in time of war or while receiving special pay, the maximum punishment authorized is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. If a servicemember shows disrespect towards a sentinel or lookout, the maximum punishment authorized is forfeiture of two-thirds pay per month for three months and confinement for 3 months.[3]

[1] MCM, Part IV, ¶104b(2).

[2] MCM 1984, App. 6c, ¶166.

[3] MCM, Part IV, ¶104.e.

5. Relationship to Federal Civilian Practice

Offenses against or by a sentinel or lookout are unique military offenses. For civilians in the federal government who hold security positions, these acts are typically characterized as "neglect of duty" infractions and addressed through adverse administrative actions that can result in reprimands, suspensions, or terminations of employment.[4]

6. Recommendation and Justification

Recommendation 134-104: Migrate Article 134 (¶104) to the new Article 95.

Offenses against or by a lookout addresses conduct that is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

This Report also proposes that the disrespect portion currently addressed under Article 134 (MCM, Part IV, ¶104b(1)) be migrated to a new enumerated punitive article, Article 95a (Disrespect Towards Sentinel or Lookout).

8. Legislative Proposal

SEC. 1011. OFFENSES BY SENTINEL OR LOOKOUT.

Section 895 of title 10, United States Code (article 95 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(8), is amended to read as follows:

"§895. Art. 95. Offenses by sentinel or lookout

[4] 5 C.F.R. § 752.603—Standard for Action (2014). Federal agencies are empowered to take adverse administrative action against an employee for "reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 C.F.R. § 752.603(a); *see also* 5 U.S.C. § 7503(b).

"(a) DRUNK OR SLEEPING ON POST, OR LEAVING POST BEFORE BEING RELIEVED.—Any sentinel or lookout who is drunk on post, who sleeps on post, or who leaves post before being regularly relieved, shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed other than in time of war, by such punishment, other than death, as a court-martial may direct.

"(b) LOITERING OR WRONGFULLY SITTING ON POST.—Any sentinel or lookout who loiters or wrongfully sits down on post shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1011 would migrate the loitering portion of the offense of "Sentinel or lookout: offenses against or by" from Article 134 (the General article) to the redesignated Article 95 (Offenses by sentinel or lookout). The wrongfulness of loitering by a sentinel or lookout is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 95a (New Provision) – Disrespect Toward Sentinel or Lookout

10 U.S.C. § 895a

1. Summary of Proposal

This proposal would migrate the disrespect offense currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 95a (Disrespect towards sentinel or lookout). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 95a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶104, the offense prohibits misconduct toward or by sentinel or lookout not addressed in Article 113, Misbehavior of Sentinel or Lookout. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated offenses against or by a sentinel or lookout under Article 134 in the 1951 MCM.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Offenses Against or By Sentinel or Lookout. If a sentinel or lookout wrongfully loiters or sits upon a post in time of war or while receiving special pay, the maximum punishment authorized is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months. If a servicemember shows disrespect towards a sentinel or lookout, the maximum punishment authorized is forfeiture of two-thirds pay per month for three months and confinement for three months.[3]

5. Relationship to Federal Civilian Practice

Offenses against or by a sentinel or lookout are unique military offenses. For civilians in the federal government who hold security positions, these acts are typically characterized as

[1] MCM, Part IV, ¶104b(1).

[2] MCM 1984, App. 6c, ¶166.

[3] MCM, Part IV, ¶104.e.

"neglect of duty" infractions and addressed through adverse administrative actions that can result in reprimands, suspensions, or terminations of employment.[4]

6. Recommendation and Justification

Recommendation 134-104: Migrate Article 134 (¶104) to the redesignated Article 95.

Offenses against or by a lookout addresses conduct that is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

This Report also proposes migrating the loitering portion of offenses against or by sentinel or lookout currently addressed under Article 134 (the General Article (MCM, Part IV, ¶104b(2)) to a new Article 95 (Offenses by Sentinel or Lookout).

8. Legislative Proposal

See the Legislative Proposal for §913. Art. 113. Misbehavior of Sentinel or Lookout, for the loitering portion of the offense.

SEC. 1012. DISRESPECT TOWARD SENTINEL OR LOOKOUT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 895 (article 95 of the Uniform Code of Military Justice), as amended by section 1011, the following new section (article):

"§895a. Art. 95a. Disrespect toward sentinel or lookout

"(a) DISRESPECTFUL LANGUAGE TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, uses wrongful and disrespectful language that is directed toward and within the

[4] 5 C.F.R. § 752.603—Standard for Action (2014). Federal agencies are empowered to take adverse administrative action against an employee for "reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 C.F.R. § 752.603(a); *see also* 5 U.S.C. § 7503(b).

hearing of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.

"(b) DISRESPECTFUL BEHAVIOR TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, behaves in a wrongful and disrespectful manner that is directed toward and within the sight of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1012 would create a new section, Article 95a (Disrespect toward a sentinel or lookout). The new statute would include the disrespect portion of the offense of "Sentinel or lookout: offenses against or by," which would be migrated from Article 134 (the General article). The offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 96 (Current Law) – Releasing Prisoner Without Proper Authority
10 U.S.C. § 896

1. Summary of Proposal

This proposal would retain the existing provisions of Article 96 and migrate into the statute the offense of drinking liquor with a prisoner currently addressed under Article 134 (the General Article).[1] Article 96 would be retitled as "Release of prisoner without authority; drinking with prisoner." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 96 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 96 prohibits servicemembers who are responsible for prisoners from releasing them without proper authority, or allowing them to escape.

3. Historical Background

Article 96 was derived from Article 73 of the 1948 Articles of War.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Releasing Prisoner without Proper Authority: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.[4]

5. Relationship to Federal Civilian Practice

18 USC § 752 (Instigating or assisting escape) sets forth a similar offense to Article 96. It proscribes instigating, aiding or assisting in the escape of a prisoner from custody or confinement.

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[1] MCM, Part IV, ¶74. The offense of drinking liquor with a prisoner is discussed in this Report under "Article 96 – Releasing Prisoner Without Proper Authority – Addendum."

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1227 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶20.e.

6. Recommendation and Justification

Recommendation 96: Migrate the offense of drinking liquor with prisoner in Article 134, the General Article (MCM, Part IV, ¶74), to Article 96.

This change would align offenses concerning custody of prisoners under Article 96.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1013. RELEASE OF PRISONER WITHOUT AUTHORITY; DRINKING WITH PRISONER.

Section 896 of title 10, United States Code (article 96 of the Uniform Code of Military Justice), is amended to read as follows:

"§896. Art. 96. Release of prisoner without authority; drinking with prisoner

"(a) RELEASE OF PRISONER WITHOUT AUTHORITY.—Any person subject to this chapter—

"(1) who, without authority to do so, releases a prisoner; or

"(2) who, through neglect or design, allows a prisoner to escape;

shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with the law.

"(b) DRINKING WITH PRISONER.—Any person subject to this chapter who unlawfully drinks any alcoholic beverage with a prisoner shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1013 would amend Article 96 and retitle the statute as "Release of prisoner without authority; drinking with prisoner." As amended, Article 96 would include the offense of "Drinking liquor with prisoner," which would be migrated from Article 134 (the General article). The latter offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 96 – Release of Prisoner without Authority; Drinking with Prisoner – Addendum

(Drinking Liquor with Prisoner)

1. Summary of Proposal

This proposal would migrate the offense of drinking liquor with prisoner currently addressed under Article 134 (the General Article)[1] to Article 96 (Releasing prisoner without proper authority; drinking with prisoner). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶74, the offense requires a showing that a person with charge over a prisoner drank liquor with that prisoner. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized "drinking liquor with a prisoner" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated "drinking liquor with a prisoner" as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of drinking liquor with prisoner: forfeiture of two-thirds pay for three months and confinement for three months.[4]

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[1] MCM, Part IV, ¶74.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 729 (photo reprint 1920) (2d ed. 1896) (citations omitted) (noting successful prosecutions for soldiers under the General Article for soldiers "bringing whiskey into the guardhouse").

[3] MCM 1951, App. 6c, ¶133.

[4] MCM, Part IV, ¶74.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1791 (Providing or Possessing Contraband in Prison) sets forth a similar offense to the offense of drinking liquor with a prisoner in Article 134. It imposes a maximum of 1 year of confinement for providing alcohol to any federal prison inmate.[5]

6. Recommendation and Justification

Recommendation 134-74: (1) Modify drinking liquor with a prisoner to (a) apply to all alcoholic beverages; and (b) apply to all persons subject to the code; (2) migrate the offense of drinking liquor with prisoner in Article 134, the General Article (MCM, Part IV, ¶74), to Article 96.

Fraternizing with prisoners by consuming alcohol with them in violation of confinement facility rules erodes discipline regardless of whether it is a prison guard or any other person subject to the UCMJ.

Migrating the offense drinking liquor with a prisoner to Article 96 logically aligns the offense with the existing UCMJ prisoner-related offenses. Drinking liquor with a prisoner would ordinarily be in violation of confinement facility regulations. Accordingly, it is inherently prejudicial to good order and discipline and is not reliant upon the "terminal element" of Article 134 as the basis for its criminality.[6]

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

See Article 96 (Releasing Prisoner Without Proper Authority), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 96 (Releasing Prisoner Without Proper Authority), *supra*, at paragraph 9.

[5] 18 U.S.C. § 1791(b)(2), (d)(1)(D).

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 97 – Unlawful Detention
10 U.S.C. § 897

1. Summary of Proposal

This Report recommends no change to Article 97. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 97.

2. Summary of the Current Statute

Article 97 prohibits the unlawful arrest, apprehension or confinement of another person.

3. Historical Background

Article 97 is derived from Article 96 (the "General Article") of the 1948 Articles of War, as well as Navy court-martial practice under the Navy Courts and Boards Manual, § 101.[1] Article 97 was designed to prevent abuse of authority by military law enforcement personnel and other individuals with confinement authority, and to punish such abuses.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Article 97 applies to military law enforcement personnel acting under "color of authority" for their official duties.[4] The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Unlawful Detention: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[5]

5. Relationship to Federal Civilian Practice

The Fourth Amendment to the Constitution prohibits the seizure of a person without probable cause. In addition, 42 U.S.C. § 1983 permits civil actions to vindicate violations of

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[1] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 260 (1951).

[2] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.16[2] at 337-38 (2d ed. 2012).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] *See* United States v. Johnson, 3 M.J. 361, 363 (C.M.A. 1977) (Scope of this section pertaining to unlawful apprehension is limited to improper acts by those delegated authority with respect to arrest, apprehension and confinement and does not apply to the private act of false imprisonment by one not acting under a delegation of authority).

[5] MCM, Part IV, ¶21.e.

a person's civil rights by persons acting in their official capacity "under color of law," including alleged law enforcement misconduct.[6]

6. Recommendation and Justification

Recommendation 97: No change to Article 97.

In view of the well-developed case law addressing Article 97's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] *See, e.g.,* Monroe v. Pape, 365 U.S. 167, 172 (1961) (holding that actions of city police officers in conducting allegedly illegal search and seizure were performed "under color of" state statute within meaning of 42 U.S.C. § 1983); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971) (ruling that 42 U.S.C. § 1983 permits an "implied cause of action" to vindicate Fourth Amendment freedom from unreasonable search and seizures had been violated by federal agents; victims of Fourth Amendment violations may sue for the violation of the Amendment itself).

Article 98 (Current Law) – Noncompliance with Procedural Rules
10 U.S.C. § 898

1. Summary of Proposal

This Report recommends no change to Article 98, except to redesignate it as Article 131f as part of the realignment of the punitive articles. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131f.

2. Summary of the Current Statute

Article 98 prohibits commanders and other persons with duties related to the administration of military justice from unnecessarily delaying disposition of a case or knowingly and intentionally failing to enforce or comply with any provisions of the UCMJ.

3. Historical Background

Article 98 was derived from Article 70 of the 1948 Articles of War.[1] Since the UCMJ was enacted in 1951,[2] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Noncompliance with Procedural Rules: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[3]

5. Relationship to Federal Civilian Practice

The Hyde Amendment, which is widely published as a "legislative note" attached to 18 U.S.C. § 3006A (popularly entitled "The Criminal Justice Act"), authorizes federal courts to award attorneys' fees and court costs to criminal defendants "where the court finds that the position of the United States was 'vexatious, frivolous, or in bad faith.'" In such cases, the federal court may allow defendants to recover some of the costs they incurred in

[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949) (noting that Article 98 was intended to enforce procedural provisions of this code, for example, article 37 (unlawfully influencing action of court) and article 31 (compulsory self-incrimination)"); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 260-61 (1951) (noting punishment for Article 98 type misconduct would have fallen under the "general articles" for the respective AW and AGN prior to the UCMJ).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] MCM, Part IV, ¶22.e.

fighting the government's investigation and prosecution by authorizing an award of attorneys' fees and court costs when the prosecution's evidence was so baseless as to be "frivolous."[4]

6. Recommendation and Justification

Recommendation 98: No change to Article 98, except to redesignate it as Article 131f.

In view of the well-developed law addressing Article 98's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[4] *See* United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999) (interpreting "frivolous" in the law enforcement context, as requiring "bad faith" manifested by "a reckless disregard for the truth") (citation omitted).

Article 99 – Misbehavior Before the Enemy
10 U.S.C. § 899

1. Summary of Proposal

This Report recommends no change to Article 99. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 99.

2. Summary of the Current Statute

Article 99 prohibits misbehavior before the enemy, including surrendering or through disobedience, neglect, or intentional misconduct endangering the safety of a command. The offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

Misbehavior before the enemy has been criminalized under American military law since the 1775 Articles of War.[1] Article 99 is derived from Article 75 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Cowardice is defined under Article 99 as misbehavior motivated by fear.[4] Military appellate courts have held that while fear itself is a natural feeling of apprehension when going into battle, the mere display of apprehension is not enough to constitute this offense.[5]

The President, under Article 56, has prescribed death as the maximum punishment for the offense of Misbehavior before the Enemy.[6]

5. Relationship to Federal Civilian Practice

Article 99 is a unique military offense with no direct federal civilian counterpart.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 622-23 (photo reprint 1920) (2d ed. 1896).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶23.b.5.

[5] *See* United States v. Yarborough, 5 C.M.R. 106 (C.M.A. 1968).

[6] MCM, Part IV, ¶23.e.

6. Recommendation and Justification

Recommendation 99: No change to Article 99.

In view of the well-developed case law addressing Article 99's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment

Article 100 – Subordinate Compelling Surrender
10 U.S.C. § 900

1. Summary of Proposal

This Report recommends no change to Article 100. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 100.

2. Summary of the Current Statute

Article 100 prohibits a subordinate from compelling or attempting to compel the commander of any place, vessel, aircraft, unit or other military property, to give it up to an enemy or to abandon it. Article 100 also prohibits any attempt to surrender without proper authority. The offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

American military law has forbid subordinates compelling their commander to surrender since the Revolutionary War.[1] Article 100 was derived from Article 76 of the 1948 Articles of War and Article 4 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Subordinate Compelling Surrender: death or such other punishment as a court-martial may direct.[4]

5. Relationship to Federal Civilian Practice

Article 100 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 100: No change to Article 100.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 622 (photo reprint 1920) (2d ed. 1896).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶24.e.

In view of the well-developed case law addressing Article 100's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 101 – Improper Use of Countersign
10 U.S.C. § 901

1. Summary of Proposal

This Report recommends no change to Article 101. Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 101.

2. Summary of the Current Statute

Article 101 prohibits the unauthorized disclosure of the parole or countersign in time of war. A "countersign" is a word, signal, or procedure given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines.[1] It consists of a secret challenge and a password, signal, or procedure.[2] By contrast, a "parole" is a word used as a check on the countersign; it is given only to those who are entitled to inspect guards and to commanders of guards.[3] In time of war, this offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

Countersigns and parole are used to control specific areas of military significance, and they have been in existence since commanders set pickets and sentries stood their posts.[4] In American military law, improper use of a countersign has constituted a military offense since the Revolutionary War.[5] Article 101 was derived from Article 77 of the 1948 Articles of War.[6] Since the UCMJ was enacted in 1950,[7] the statute has remained unchanged.

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[1] MCM, Part IV, ¶25.c.(1).

[2] *Id.*

[3] *Id.* at ¶25.c.(2).

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.20[2] at 360 (2nd. ed. 2012).

[5] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 619-20 (photo reprint 1920) (2d ed. 1896) (reciting historic development of AW 41 of 1874 from the British Articles of War, through the 1775 and 1776 American Articles of War).

[6] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1228 (1949).

[7] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Improper Use of Countersign: death, or such other punishment as a court-martial may direct.[8]

5. Relationship to Federal Civilian Practice

Article 101 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 101: No change to Article 101.

In view of the well-developed case law addressing Article 101's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[8] MCM, Part IV, ¶25.e.

Article 102 – Forcing a Safeguard
10 U.S.C. § 902

1. Summary of Proposal

This Report recommends no change to Article 102. Part II of the Report will address the Manual for Courts-Martial provisions implementing the Article 102.

2. Summary of the Current Statute

A safeguard is a "detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war . . . ."[1] Article 102 prohibits the forcing of a violation of the protection of a safeguard. In time of war, or in circumstances amounting to a state of belligerency short of war, the offense is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized forcing a safeguard since the Revolutionary War.[2] The current Article 102 was derived from Article 78 of the 1948 Articles of War.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The Manual for Courts-Martial states that a formal "time of war" is not required for Article 102 to apply; the offense also is punishable during "a state of belligerency short of formal war."[5] The legislative history to Article 102 indicates the drafters of the UCMJ were concerned that safeguards may be necessary in times when a formal state of war did not

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[1] MCM, Part IV, ¶26.c(1).

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 663 (photo reprint 1920) (2d ed. 1896) (noting that the American "forcing a safeguard offence first appeared in the 1776 Articles of War and originally only extended to periods of defined "war" or open rebellion against the United States).

[3] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1228-29 (1949) [hereinafter *Hearings on H.R. 2498*]; LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 262 (1951) (noting "the words time of war have been deleted [in the conversion of AW 78 to UCMJ Article 102] in order to cover situations where a safeguard has been placed but a formal state of war does not exist.").

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *Id.* at ¶26.c(3).

exist.[6] The President, under Article 56, has prescribed the following maximum punishment for the offense of Forcing a Safeguard: death, or such other punishment as a court-martial may direct.[7]

5. Relationship to Federal Civilian Practice

Article 102 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 102: No change to Article 102.

In view of the well-developed case law addressing Article 102's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] See *Hearings on H.R. 2498*, *supra* note 3, at 1228-29.

[7] MCM, Part IV, ¶26.e.

Article 103 (Current Law) – Captured or Abandoned Property
10 U.S.C. § 903

1. Summary of Proposal

This Report recommends no change to Article 103, except to redesignate it as Article 108a as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 108a.

2. Summary of the Current Statute

Article 103 prohibits the misuse or neglect of captured or abandoned property, to include buying, selling, or trading in captured or abandoned property, and engaging in looting or pillaging.

3. Historical Background

American military law has criminalized wrongful disposition of captured property since the Revolutionary War.[1] The current Article 103 was derived from Articles 79 and 80 of the 1948 Articles of War and Article 8 of the 1930 Articles for Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Captured or Abandoned Property: for looting and pillaging, any punishment, other than death, that a court-martial may direct; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

5. Relationship to Federal Civilian Practice

Article 103 is a unique military offense with no direct federal civilian counterpart.

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 557 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the American "capture property" offense to Article of War XXIX of 1775).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 262 (1951) (noting that language "against looting and pillaging," was specifically added to the new Article 103 in addition to the provisions in the 1948 Articles of War).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶27.e.

6. Recommendation and Justification

Recommendation 103: No change to Article 103, except to redesignate it as Article 108a.

In view of the well-developed case law addressing Article 103's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 104 (Current Law) – Aiding the Enemy
10 U.S.C. § 904

1. Summary of Proposal

This Report recommends no change to Article 104, except to redesignate it as Article 103b as part of the realignment of the punitive articles. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 103b.

2. Summary of the Current Statute

Article 104 prohibits aiding the enemy, or attempting to do so, with arms, ammunition, supplies, money, or other things; or by harboring, protecting, or giving intelligence to or communicating with the enemy.[1] The offense is punishable by death, or other such punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized "aiding the enemy" since the Revolutionary War.[2] The current Article 104 was derived from Article 81 of the 1948 Articles of War and Article 4 of the 1930 Articles for Government of the Navy.[3] The statute remains unchanged since the UCMJ was enacted in 1950.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Aiding the Enemy: death, or such other punishment as a court-martial may direct.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 794 (Gathering or delivering defense information to aid foreign government) sets forth a similar offense to Article 104.

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[1] Article 104 applies "to all persons, whether or not subject to military law." MCM, Part IV, ¶28.c(1). The MCM also makes allowance for trial by military commission for civilians accused of "aiding the enemy" under Article 104. *See id.*

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 629 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the American "aiding the enemy" offense to Articles of War XXVII and XXVIII of 1775).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949).

[4] MCM, Part IV, ¶28.e.

6. Recommendation and Justification

Recommendation 104: No change to Article 104, except to redesignate it as Article 103b.

In view of the well-developed case law addressing Article 104's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 104 (New Location) – Public Records Offenses

10 U.S.C. § 904

1. Summary of Proposal

This proposal would migrate the offense of altering, concealing, removing, mutilating, obliterating, or destroying a public record, which is currently addressed under Article 134 (the General Article) to the redesignated Article 104 (Public record offenses).[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶99, the offense of altering a public record requires a showing that the accused altered, concealed, removed, mutilated, obliterated, destroyed, or took a public record with the intent to do any of those actions. A public record includes "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which there was a duty to report."[2] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated altering a public record as an Article 134 offense in the 1951 MCM.[3] The offense of altering a public record was derived from 18 U.S.C. § 2071.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Altering, Concealing, Removing, Mutilating, Obliterating, or Destroying a

[1] MCM, Part IV, ¶99.

[2] MCM, Part IV, ¶99.c.

[3] MCM 1951, App. 6c, ¶160.

[4] *See* United States v. Ogilve, 29 M.J. 1069, 1071-72 (A.C.M.R. 1990) (comparing the UCMJ altering a public record offense to 18 U.S.C. § 2701 and determining that they encompass the same scope of documents).

Public Record: forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2071 (Concealment, removal, or mutilation generally) sets forth a similar offense to the offense in Article 134.

6. Recommendation and Justification

Recommendation 134-99: Migrate the offense of altering, concealing, removing, mutilating, obliterating, or destroying a public record in Article 134 (MCM, Part IV, ¶99) to Article 104.

Destroying or altering public records is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1015. PUBLIC RECORDS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 903b (article 103b of the Uniform Code of Military Justice), as redesignated by section 1001(5), the following new section (article):

"§904. Art. 104. Public records offenses

"Any person subject to this chapter who, willfully and unlawfully—

"(1) alters, conceals, removes, mutilates, obliterates, or destroys a public record; or

[5] MCM, Part IV, ¶99.e.

"(2) takes a public record with the intent to alter, conceal, remove, mutilate, obliterate, or destroy the public record;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1015 would migrate the offense of "Public record: altering, concealing, removing, mutilating, obliterating, or destroying" from Article 134 (the General article) to redesignated Article 104 (Public records offenses). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 105 (Current Law) – Misconduct as Prisoner
10 U.S.C. § 905

1. Summary of Proposal

This Report recommends no change to Article 105, except to redesignate it as Article 98 as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 98.

2. Summary of the Current Statute

Article 105 prohibits misconduct by those subject to the UCMJ, while in the hands of the enemy in time war, from securing favorable treatment from their captors in a manner contrary to law, custom, or regulation.[1] Article 105 also prohibits those in position of authority over such persons from maltreating them.

3. Historical Background

Although the Articles of War did not include a specific Article proscribing misconduct while held as an enemy prisoner, prior to enactment of the UCMJ such misconduct was punishable under the "General Article."[2] Article 105 established a new offense when the UCMJ was enacted, and stemmed from episodes of prisoner misconduct during World War II.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

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[1] *See generally* United States v. Batchelor, 22 C.M.R. 144, 149, 161-62 (C.M.A. 1956) (accused's recommending a fellow prisoner be shot to protect the Chinese if the fellow prisoner were returned to American control violated Article 105).

[2] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 91-92 (photo reprint 1920) (2d ed. 1896) ("So a prisoner of war, though not subject, while held by the enemy, to the discipline of his own army, would, when exchanged or paroled, be not exempt from liability for such offences as criminal acts or injurious conduct committed during his captivity against other officers or soldiers in the same status.").

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 262 (1951).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Misconduct as a Prisoner: any punishment, other than death, as a court-martial may direct.[5]

5. Relationship to Federal Civilian Practice

Article 105 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 105: No change to Article 105, except to redesignate it as Article 98.

In view of the well-developed case law addressing Article 105's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] MCM, Part IV, ¶29.e.

Article 105a (New Provision) – False or Unauthorized Pass Offenses

10 U.S.C. § 905a

1. Summary of Proposal

This proposal would migrate the offense of false or unauthorized pass, currently addressed under Article 134 (the General Article)[1] to a newly designated punitive article, Article 105a (False or unauthorized pass offenses). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 105a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶77, the offense of false or unauthorized pass offenses requires proof that the accused wrongfully made or altered an official pass, permit, certificate, identification card, or similar document; wrongfully sold or transferred such a document; or wrongfully used such a document. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized use and production of "false passes" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated "false or unauthorized pass offenses" as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

In practice, this offense prohibits a wide variety of fraud and wrongful use of identification documents, discharge certificates, official passes and other military permits.[4]

The President, under Article 56, has prescribed the following maximum punishments for the offense of False or Unauthorized Pass Offenses: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[5]

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[1] MCM, Part IV, ¶77.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 732 (photo reprint 1920) (2d ed. 1896) (citing a successful prosecution under the General Article for "forging the name of an officer to a pass or furlough").

[3] MCM 1951, App. 6c, ¶138.

[4] MCM, Part IV, ¶77.c(1).

5. Relationship to Federal Civilian Practice

18 U.S.C. § 499 (Military, naval, or official passes) sets forth a similar offense to the offense of false or unauthorized pass offenses in Article 134.

6. Recommendation and Justification

Recommendation 134-77: Migrate the offense of false or unauthorized pass offenses in Article 134 (MCM, Part IV, ¶77) to Article 105a.

Migrating the false or unauthorized pass offenses to Article 105a aligns the offense with the relocated and similar subject matter Article 105 forgery offense. Producing or using false or unauthorized passes is inherently prejudicial to good order and discipline. Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1016. FALSE OR UNAUTHORIZED PASS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905 (article 105 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(12), the following new section (article):

"§905a. Art. 105a. False or unauthorized pass offenses

"(a) WRONGFUL MAKING, ALTERING, ETC.—Any person subject to this chapter who, wrongfully and falsely, makes, alters, counterfeits, or tampers with a military or official pass, permit, discharge certificate, or identification card shall be punished as a court-martial may direct.

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[5] MCM, Part IV, ¶77.e.

"(b) WRONGFUL SALE, ETC.—Any person subject to this chapter who wrongfully sells, gives, lends, or disposes of a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

"(c) WRONGFUL USE OR POSSESSION.—Any person subject to this chapter who wrongfully uses or possesses a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1016 would create a new section, Article 105a (False or unauthorized pass offenses). The new statute would include the offense of "False or unauthorized pass offenses," which would be migrated from Article 134 (the General article). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 106 (Current Law) – Spies
10 U.S.C. § 906

1. Summary of Proposal

This proposal would amend Article 106 by aligning the death penalty provision in the offense with the standard set forth in Article 106a (Espionage) and in the other capital offenses under the UCMJ. This proposal would revise the current provision to reflect the standard used for other capital offenses, under which an accused guilty of a capital offense may be sentenced to "death or other such punishment as a court-martial may direct." This proposal also recommends redesignating the offense as Article 103 (Spies) as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 103 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 106 prohibits any person in time of war from spying for the enemy, by lurking or acting as a spy in or about any place, aircraft, or vessel, within the control or jurisdiction of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or in any other place engaged in the work in aid of the prosecution of the war by the United States. It is the only offense in the UCMJ in which the court-martial has no option at sentencing other than death.

3. Historical Background

The death penalty has not always been a mandatory punishment for spies in American military justice. It was not mandatory in the Articles of War during the Revolutionary War;[1] became mandatory only for aliens in 1806,[2] and then in 1862 became the mandatory penalty for all persons convicted of spying under the Articles of War.[3] In the Navy, death was not a mandatory punishment for spying until 1950 when the UCMJ was enacted.[4]

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[1] David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty*, 127 MIL. L. REV. 1, 4 (1990) (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 765 n. 11 (photo reprint 1920) (2d ed. 1896)).

[2] Anderson, *supra* note 1, at 5.

[3] *Id*. at 6 (citing WINTHROP, *supra* note 1, at 766, n.11).

[4] *See* AGN 4, 5 of 1930.

Article 106 was derived from Article 82 of the Articles of War.[5] Since the UCMJ was enacted in 1950,[6] the statute has remained unchanged.

More recently, the Military Commissions Act of 2006, which applies to alien unprivileged enemy belligerents, makes the death penalty discretionary for spies.[7]

4. Contemporary Practice

There are no reported cases of a prosecution under Article 106.[8] Article 106 prescribes the following mandatory punishment for the offense of spying: death.[9]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 794 (Gathering or delivering defense information to aid foreign government) sets forth a similar offense to Article 106, with the death penalty available, but not mandatory. The statute authorizes punishment "by death or by imprisonment for any term of years or for life."[10]

6. Recommendation and Justification

Recommendation 106: Amend Article 106 to make the death penalty discretionary, and to redesignate it as Article 103.

This proposed amendment would return the authorized punishment to what it was previously in the armed forces, and would align the authorized punishment for spying to closely related punitive articles, and with federal practice and the military commissions.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by addressing inconsistencies in the current Article 106 with similar provisions in the UCMJ and in U.S. law.

Article 106a prohibits espionage and includes the death penalty as an available punishment, but does not make the death penalty a mandatory punishment.

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[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949) [hereinafter *Hearings on H.R. 2498*].

[6] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[7] 10 U.S.C. §§ 948c & 950t (27).

[8] The most recent reported military prosecution for spying was in a military commission in 1945, in which the death sentence was later commuted to life in prison. Colepaugh v. Looney, 235 F.2d 429, 433 (10th Cir. 1956).

[9] MCM, Part IV, ¶30.e.

[10] 18 U.S.C. § 794.

8. Legislative Proposal

SEC. 1014. PENALTY FOR ACTING AS A SPY.

Section 903 of title 10, United States Code (article 103 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(7), is amended by inserting before the period at the end of the first sentence the following: "or such other punishment as a court-martial or a military commission may direct.".

9. Sectional Analysis

Section 1014 would amend Article 103 (Spies), as transferred and redesignated by Section 1001(7), *supra*, by replacing the mandatory death penalty currently required with a discretionary death penalty similar to that authorized under existing Article 106a (Espionage) and for all other capital offenses under the Code.

Article 106 (New Location) – Impersonating a Commissioned, Warrant, Noncommissioned, or Petty Officer, or an Agent or Official

10 U.S.C. § 906

1. Summary of Proposal

This proposal would migrate the offense of impersonating a commissioned, warrant, noncommissioned or petty officer, or an agent or official, currently addressed under Article 134 (the General Article)[1] to a new stand-alone enumerated punitive article, Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶86, the offense of impersonating a military official requires a showing that the accused willfully and wrongfully impersonated a commissioned, warrant, noncommissioned, or petty officer, or an agent of superior authority of one of the armed forces of the United States, or an official of a certain government. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized "impersonating an officer" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated "impersonating an officer" as an Article 134 offense since the 1951 MCM.[3] In one of the first cases to construe the new Article 134 version of the "impersonating an officer" offense, the (then) Court of Military Appeals succinctly explained the gravamen of the offense: "It requires little imagination to conclude that a spirit of confusion and disorder, and lack of

[1] MCM, Part IV, ¶86.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 731 (photo reprint 1920) (2d ed. 1896) (noting "Falsely personating and acting as an officer" constituted an offense under the General Article).

[3] MCM 1951, App. 6c, ¶145.

discipline in the military would result if enlisted personnel were permitted to assume the role of officers and masquerade as persons of high rank."[4]

4. Contemporary Practice

In its modern form, the offense forbids impersonation not only of military officials, but also other governmental agents or officials.[5] The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Impersonating a Commissioned, Warrant, Noncommissioned or Petty Officer, or an Agent or Official: if with intent to defraud, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[6]

5. Relationship to Federal Civilian Practice

U.S. Code Title 18, Chapter 43 (False Personation) sets forth a series of factually similar offenses to impersonating an officer under Article 134, in particular 18 U.S.C. § 912 (Officer or employee of the United States).

6. Recommendation and Justification

Recommendation 134-86: Migrate the offense of impersonating a commissioned, warrant, noncommissioned or petty officer, or an agent or official to the new stand-alone Article 106, and conform the article to the definition of "officer" in 10 U.S.C. § 101(1).

Migrating the impersonating an officer offense to its own enumerated punitive article—Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official)—would align the offense with the other similar subject matter offenses under the UCMJ (i.e., "wearing unauthorized insignia, decoration, etc." migrating from Article 134 (MCM, Part IV, ¶113) to Article 106a). Impersonating a commissioned officer, warrant officer, noncommissioned officer, or petty officer is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

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[4] United States v. Messenger, 6 C.M.R. 21, 25 (C.M.A. 1952) (affirming conviction for impersonation of a naval officer by a junior enlisted sailor even where the sailor derived no direct "benefit" from the impersonation).

[5] MCM, Part IV, ¶86.b(1); *see also* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.31[2][a] at 860 (2nd ed. 2012) (citing United States v. Felton, 31 M.J. 526, 530 (A.C.M.R. 1990) (impersonation of CID agent)).

[6] MCM, Part IV, ¶86.e.

8. Legislative Proposal

SEC. 1017. IMPERSONATION OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905a (article 105a of the Uniform Code of Military Justice), as added by section 1016, the following new section (article):

"§906. Art. 106. Impersonation of officer, noncommissioned or petty officer, or agent or official

"(a) IN GENERAL.—Any person subject to this chapter who, wrongfully and willfully, impersonates—

"(1) an officer, a noncommissioned officer, or a petty officer;

"(2) an agent of superior authority of one of the armed forces; or

"(3) an official of a government;

shall be punished as a court-martial may direct.

"(b) IMPERSONATION WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and with intent to defraud, impersonates any person referred to in paragraph (1), (2), or (3) of subsection (a) shall be punished as a court-martial may direct.

"(c) IMPERSONATION OF GOVERNMENT OFFICIAL WITHOUT INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and without intent to defraud, impersonates an official of a government by committing an act that

exercises or asserts the authority of the office that the person claims to have shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1017 would migrate the offense of "Impersonating a commissioned, warrant, noncommissioned, petty officer or agent of official" from Article 134 (the General article) into the redesignated Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official). The term "officer" as used in subsection (a)(1) of the statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 106a (Current Law) – Espionage
10 U.S.C. § 906a

1. Summary of Proposal

This Report recommends no change to Article 106a, except to redesignate it as Article 103a as part of the realignment of the punitive articles. Part II of this Report will address the Manual for Courts-Martial provisions implementing the new Article 103a.

2. Summary of the Current Statute

Article 106a prohibits espionage during peacetime. It is the peacetime equivalent to Article 106 (Spies). The offense of Espionage is punishable by death or other such punishment as a court-martial may direct.

3. Historical Background

Article 106a was added to the Code in 1985.[1] The statute has remained unchanged since then.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Espionage: death, or such other punishment as a court-martial may direct.[2]

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 792-99 (Espionage and Censorship) set forth a similar offenses to Article 106a.

6. Recommendation and Justification

Recommendation 106a: No change to Article 106a, except to redesignate it as Article 103a.

In view of the well-developed case law addressing Article 106a's provisions, change to the content of the statute is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

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[1] NDAA FY 1986, Pub. L. No. 99-145, Title V, § 534(a), 99 Stat. 583, 634 (1985).

[2] MCM, Part IV, ¶30.e.

Article 106a (New Location) – Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button

10 U.S.C. § 906a

1. Summary of Proposal

This proposal would migrate the offense of wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button, currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive Article 106a (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button). Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 106a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶113, the offense of wearing unauthorized insignia requires proof that the accused willfully and wrongfully wore an unauthorized insignia, decoration, badge, ribbon, device, or lapel button. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized the wearing of unauthorized insignia, decoration, badge, ribbon, device, or lapel button since the 1775 Articles of War.[2] The first commander in chief, General George Washington, created the very first "honorary badges of distinction" for service in our country's military; he established a rigorous system to ensure that these awards would be received and worn by only the truly deserving.[3] The President designated wearing unauthorized wearing insignia, etc. as an Article 134 offense in the 1951 MCM.[4]

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[1] MCM, Part IV, ¶113.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 730 (1920 photo reprint) (2d ed. 1896).

[3] *See* General Orders of George Washington Issued at Newburgh on the Hudson, 1782–1783, p. 35 (E. Boynton ed. 1883) (reprint 1973) (requiring the submission of "incontestable proof " of "singularly meritorious action" to the Commander in Chief).

[4] MCM 1951, App. 6c, para. 176 (model specification).

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 704 (Military medals or decorations) sets forth a similar offense to the offense of wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button in Article 134. However, in 2012 the Supreme Court did declare the statute unconstitutional as to *civilians.*[6]

"Article 106a" is likely constitutional in the military context. In light of Congress' legislative authority under the Constitution to regulate the armed forces,[7] any similar criminal enactment under the special auspices of the UCMJ gains constitutional strength and enjoys significant judicial deference. This owes to the unique attributes of military society and the specialized need for discipline within that society, as repeatedly recognized by the Supreme Court.[8] Also, similar subject matter statutes currently exist under the UCMJ.[9] Finally, legal authority to criminalize the wearing of unauthorized medals is further bolstered by U.S. Supreme Court precedent establishing that false factual statements enjoy little First Amendment protection.[10]

6. Recommendation and Justification

Recommendation 134-113: Migrate the offense of wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button in Article 134 (MCM, Part IV, ¶113) to the new Article 106a.

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[5] MCM, Part IV, ¶113.e.

[6] United States v. Alvarez, 132 S.Ct. 2537, 2551 (2012); *cf.* Schact v. United States, 398 U.S. 58 (1970) (upholding constitutionality of the similar 18 U.S.C. § 702 offense, prohibiting unauthorized wear of the United States military uniform by any person).

[7] *See* U.S. CONST. art I, § 8, cl. 14.

[8] *See* Parker v. Levy, 417 U.S. 733, 760 (1974) ("There is a wide range of the conduct of military personnel to which [the UCMJ] may be applied without infringement of the First Amendment."); *accord* United States v. Forney, 67 M.J. 271, 275 (C.A.A.F. 2009) ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.") (citing *Levy*, 417 U.S. at 758).

[9] *See e.g.* Article 134 (para. 86)—Impersonating an officer. *See also* United States v. Wells, 519 U.S. 482, 505-507, and nn.8-10 (1997) (Stevens, J., dissenting) (citing "at least 100 federal false statement statutes" in the United States Code).

[10] *See, e.g.*, Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U. S. 600, 612 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech.").

This proposal would align similar offenses under Article 106a.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

8. Legislative Proposal

SEC. 1018. INSIGNIA OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 906 (article 106 of the Uniform Code of Military Justice), as added by section 1017, the following new section (article):

"§906a. Art. 106a. Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

"Any person subject to this chapter—

"(1) who is not authorized to wear an insignia, decoration, badge, ribbon, device, or lapel button; and

"(2) who wrongfully wears such insignia, decoration, badge, ribbon, device, or lapel button upon the person's uniform or civilian clothing;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1018 would create a new section, Article 106a (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button), and would migrate the offense of "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button" from Article 134 (the General article) into the new statute. When committed by servicemembers, the offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon proof of the "terminal element" of Article 134 (that the conduct

was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[11]

[11] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 107 – False Official Statements
10 U.S.C. § 907

1. Summary of Proposal

This proposal would retain the existing provisions in Article 107 and migrate into the statute the offense of false swearing, which is currently addressed under Article 134 (the General Article).[1] Article 107 would be retitled as "False official statements; false swearing." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 107 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 107 prohibits the making, with intent to deceive, of false official statements. Statements are "official" if they relate to the military duties of either the speaker or the hearer.[2]

3. Historical Background

Article 107 was derived from Articles 56 and 57 of the 1948 Articles of War, and Article 8 of the 1930 Articles for Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of False Official Statement: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1001 (Statements or entries generally) sets forth a similar offense to Article 107.

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[1] MCM, Part IV, ¶79. The offense of false swearing is discussed in this Report under "Article 107 – False Swearing – Addendum."

[2] United States v. Spicer, 71 M.J. 470, 473 (C.A.A.F. 2013) (noting the critical distinction is whether the statements relate to the official duties of either the speaker or the hearer, and whether those official duties fall within the scope of the UCMJ's reach).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229-30 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶31.e.

6. Recommendation and Justification

Recommendation 107: Migrate the offense of false swearing from Article 134, the General Article (MCM, Part IV, ¶79), to Article 107.

This change would align similar offenses under Article 107.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1019. FALSE OFFICIAL STATEMENTS; FALSE SWEARING.

Section 907 of title 10, United States Code (article 107 of the Uniform Code of Military Justice), is amended to read as follows:

"§907. Art. 107. False official statements; false swearing

"(a) FALSE OFFICIAL STATEMENTS.—Any person subject to this chapter who, with intent to deceive—

"(1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or

"(2) makes any other false official statement knowing it to be false;

shall be punished as a court-martial may direct.

"(b) FALSE SWEARING.—Any person subject to this chapter—

"(1) who takes an oath that—

"(A) is administered in a matter in which such oath is required or authorized by law; and

"(B) is administered by a person with authority to do so; and

"(2) who, upon such oath, makes or subscribes to a statement;

if the statement is false and at the time of taking the oath, the person does not believe the statement to be true, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1019 would amend Article 107 and retitle the statute as "False official statements; false swearing." As amended, Article 107 would include the offense of "False swearing," which would be migrated from Article 134 (the General article). The offense of false swearing is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 107 – False Official Statements; False Swearing – Addendum
(False Swearing)

1. Summary of Proposal

This proposal would migrate the offense of false swearing currently addressed under Article 134 (the General Article)[1] into Article 107 (False Official Statements; False Swearing). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶79, the offense requires a showing of false statements made under oath. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized "false swearing" (distinct from perjury) since the 1921 MCM.[2] The President designated false swearing as an Article 134 offense in the 1951 MCM.[3] While originally designated in the 1951 MCM as a lesser included offense of perjury,[4] under current law false swearing does not apply to statements made in judicial proceedings.[5]

4. Contemporary Practice

The UCMJ provides three separate charges for prosecuting false or deceptive acts or statements: Article 107 (False Official Statement); Article 132 (Perjury); and Article 134 (para. 80) (False Swearing). False swearing differs from a false official statement in that the

[1] MCM, Part IV, ¶79.

[2] MCM 1921, ¶446d at 463.

[3] MCM 1951, App. 6c, ¶139.

[4] MCM 1951, ¶213d(4).

[5] United States v. Smith, 26 C.M.R. 16, 18 (1958) (holding if a false statement is made under oath in a judicial proceeding, it must meet the requirements for perjury under Article 131 or no offense has been committed).

statement does not have to be official,[6] nor does it have to be made with the intent to deceive the recipient.[7] False swearing differs from Article 131 perjury in that it does not apply to statements made at a judicial proceeding.[8] Accordingly, the typical false swearing case involves a statement made under oath to law enforcement during an investigation.[9]

The President, under Article 56, has prescribed the following maximum punishment for the offense of False Swearing: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[10]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1621 (Perjury) sets forth a similar offense to the offense of false swearing in that the federal statute covers false statements both in and out of judicial proceedings.

6. Recommendation and Justification

Recommendation 134-79: Migrate the offense of false swearing in Article 134, the General Article (MCM, Part IV, ¶79), to Article 107.

Migrating the false swearing to Article 107 aligns the offense with the other nonjudicial false statements offense under the UCMJ. False swearing is inherently prejudicial to good order and discipline. Accordingly, it does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable.

8. Legislative Proposal

See Article 107 (False Official Statements), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 107 (False Official Statements), *supra*, at paragraph 9.

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[6] United States v. Spicer, 71 M.J. 470, 474-75 (C.A.A.F. 2013) (holding statements are "official" if they relate to the military duties of either the speaker or the hearer).

[7] MCM 2012, Part IV, ¶79(c)(1).

[8] *Id.*

[9] *See, e.g.,* United States v. Fisher, 58 M.J. 300, 304 (C.A.A.F. 2003) (affirming guilty plea for false swearing to law enforcement officers during interrogation; noting statement need not be false in every detail).

[10] MCM, Part IV, ¶79.e.

Article 107a (New Provision) – Parole Violation
10 U.S.C. § 907a

1. Summary of Proposal

This proposal would migrate the offense of violation of parole currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 107a (Parole violation). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶97a, the offense requires a showing that a prisoner, having been released on his word of honor from the correctional system and subject to an agreed-upon plan, has violated his word of honor and breached the terms and conditions of the plan. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated violation of parole as an Article 134 offense in the 1951 MCM[2]. However, the President only first provided elements and an explanation of the offense within Part IV of the MCM in 1998.[3]

4. Contemporary Practice

The military corrections system provides parole eligibility for all persons convicted under the code sentenced with unsuspended sentences of confinement for more than twelve months up to life imprisonment (with the possibility of parole).[4] To qualify for parole, an inmate must have served at least 1/3 of the adjudged sentence (or 20 years for a life sentence), and in no case less than 6 months of the sentence.[5]

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[1] MCM, Part IV, ¶97a.

[2] MCM 1951, App. 6c, ¶158.

[3] MCM 1998, Part IV, ¶97a.

[4] Dep't of Defense Instruction 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority, ¶6.17 (Jul. 17, 2001, as amended on Jun. 10, 2003).

[5] *Id.* at ¶¶6.17.1.2.1-6.17.1.2.3.

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Violation of Parole: bad-conduct discharge, forfeiture of two-thirds pay per month for 6 months, and confinement for 6 months.[6]

5. Relationship to Federal Civilian Practice

While the federal penal system has discontinued parole, the Title 18 equivalent is "supervised release." Under 18 U.S.C. § 3583 a court may require the convict to complete a period of supervised release following the completion of his confinement, adhering to specific conditions set forth by the court for a period of time not exceeding 5 years. Violation of supervised release may result in revocation and re-incarceration for up to 5 years (if the underlying offense prompting supervised release was a class A felony); 3 years (class B felony); 2 years (class C or D felony); or 1 year (misdemeanors).[7]

6. Recommendation and Justification

Recommendation 134-97a: Migrate the offense of violation of parole in Article 134 (MCM, Part IV, ¶97a) to the new Article 107a.

Parole violation (or in the federal criminal system, supervised release violation) is a well recognized concept in criminal law. Accordingly, parole violation offenses do not rely upon the terminal element of Article 134 as the basis for their criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1020. PAROLE VIOLATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 907 (article 107 of the Uniform Code of Military Justice), as amended by section 1019, the following new section (article):

"§907a. Art. 107a. Parole violation

"Any person subject to this chapter—

[6] MCM, Part IV, ¶97a.e.

[7] 18 U.S.C. § 3583(e)(3).

"(1) who, having been a prisoner as the result of a court-martial conviction or other criminal proceeding, is on parole with conditions; and

"(2) who violates the conditions of parole;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1020 would create a new section, Article 107a (Parole violation), and would migrate the offense of "Parole, Violation of" from Article 134 (the General article) into the new statute. This offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 108 – Military Property of United States – Sale, Loss, Damage, Destruction, or Wrongful Disposition

10 U.S.C. § 908

1. Summary of Proposal

This Report recommends no change to Article 108. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 108.

2. Summary of the Current Statute

Article 108 prohibits the misuse and abusing military property, whether by design or through neglect; misuse and abuse of military property includes selling, damaging, destroying, and losing it; military property includes all property, real or personal.

3. Historical Background

American military law has criminalized the loss, damage or sale of military property since the Revolutionary War.[1] The current Article 108 was derived from Articles 83 and 84 of the 1948 Articles of War and Article 8 of the 1930 Articles for Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Sale, Loss, Damage, Destruction, or Wrongful Disposition of Military Property: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[4]

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 629 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the American "sale/loss/damage/destruction of military property" offense to the 1776 Articles of War, § 12, Art. 3).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 264 (1951) (noting that language "Article 108, applying to all persons subject to the Uniform Code, is more extensive than Article of War 84 which applied only to 'soldiers'.").

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶32.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1361 (Government property or contracts) sets forth a similar offense to Article 108.

6. Recommendation and Justification

Recommendation 108: No change to Article 108.

In view of the well-developed case law addressing Article 108's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 109 – Property other than Military Property of the United States – Waste, Spoilage, or Destruction

10 U.S.C. § 909

1. Summary of Proposal

This Report recommends no change to Article 109. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 109.

2. Summary of the Current Statute

Article 109 prohibits the willful or reckless wasting, spoiling, destroying or damaging of property other than military property of the United States.[1]

3. Historical Background

Articles 108 and 109 are companion articles. Article 108 concerns military property, while Article 109 concerns property "other than military property of the United States." Article 109 was derived from Article 89 of the 1948 Articles of War.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Waste, Spoilage, or Destruction of Property other than Military Property of the United States: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

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[1] This category of applicable property is broad, encompassing both real and personal property. "Wasting" and "spoiling" pertains only to real property. MCM, Part. IV, ¶33.c(1). Whereas "damaging" and "destroying" pertains only to the personal property of another. *Id.* at ¶33.c(2).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶33.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. §§ 1362-67 set forth similar offenses to Article 109; these provisions concern damage or injury to instrumentalities or items used in interstate and foreign commerce.

6. Recommendation and Justification

Recommendation 109: No change to Article 109.

In view of the well-developed case law addressing Article 109's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 109a (New Provision) – Mail Matter, Taking, Opening, etc.
10 U.S.C. § 909a

1. Summary of Proposal

This proposal would migrate the offense of taking, opening, secreting, destroying, or stealing mail, currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 109a (Mail matter, taking, opening, etc). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶93, the offense requires a showing that the accused wrongfully took, opened, secreted, destroyed or stole certain mail. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Previously, the offenses of "failing to deliver the mail, or opening the mail" were charged under the General Article of the Articles of War of 1874.[2] The President first designated the "mail offenses" as an Article 134 offense in the 1951 MCM.[3] The military offenses of taking, opening, secreting, destroying, or stealing mail are designed to ensure continuous protection of mail matter regardless of whether it is part of the United States Postal Service system or the military mail system.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Mail: Taking, Opening, Secreting, Destroying, or Stealing: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5]

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[1] MCM, Part IV, ¶93.

[2] WINTHROP, MILITARY LAW AND PRECEDENTS 731 (photo reprint 1920) (2d ed. 1896).

[3] MCM 1951, App. 6c, ¶151.

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.38[2] at 901 (2d ed. 2012).

[5] MCM, Part IV, ¶93.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1702 (Obstruction of correspondence) sets forth a similar offense to the offense of taking, opening, secreting, destroying, or stealing mail Article 134.

6. Recommendation and Justification

Recommendation 134-93: Migrate the offense of taking, opening, secreting, destroying, or stealing mail in Article 134 (MCM, Part IV, ¶93) to the new Article 109a.

The offense of taking, opening, secreting, destroying, or stealing mail is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1021. WRONGFUL TAKING, OPENING, ETC. OF MAIL MATTER

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 909 (article 109 of the Uniform Code of Military Justice), the following new section (article):

"§909a. Art. 109a. Mail matter: wrongful taking, opening, etc.

"(a) TAKING.—Any person subject to this chapter who, with the intent to obstruct the correspondence of, or to pry into the business or secrets of, any person or organization, wrongfully takes mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

"(b) OPENING, SECRETING, DESTROYING, STEALING.—Any person subject to this chapter who wrongfully opens, secretes, destroys, or steals mail matter before the

mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1021 would create a new section, Article 109a (Mail matter: wrongful taking, opening, etc.), and would migrate the offense of "Mail: taking, opening, secreting, destroying, or stealing" from Article 134 (the General article) into the new statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 110 – Improper Hazarding of Vessel
10 U.S.C. § 910

1. Summary of Proposal

This proposal would amend Article 110 (Improper hazarding of vessel) to also address improper hazarding of aircraft. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 110.

2. Summary of the Current Statute

Article 110 prohibits hazarding or suffering another to hazard a vessel of the armed forces, whether by design or through negligence. "Hazard" means to put in danger of loss or injury.

3. Historical Background

Military law has criminalized hazarding a vessel since the first Articles for the Government of the Navy in 1799.[1] The current Article 110 was derived from Articles 8 and 9 of the 1930 Articles for the Government of the Navy.[2] As construed by the MCM, "vessel" pertains only to "watercraft."[3] Since the UCMJ was enacted in 1950,[4] Article 110 has remained unchanged.

4. Contemporary Practice

Since no punitive article directly addresses the improper hazarding of aircraft, the military has had to resort to other punitive articles to respond to misconduct relating to aircraft, such as Article 92 (Dereliction of duty) (confinement for 2 years) and Article 108 (Military property of the United States – sale, loss, damage, destruction, or wrongful disposition) (confinement for 10 years).[5] However, these other offenses do not carry the same maximum punishment as Article 110 (Improper hazarding of vessel).

The President, under Article 56, has prescribed the following maximum punishments for the offense of Improper Hazarding of Vessel: if done willfully and wrongfully, death or such

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[1] AGN 42 of 1799.

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[3] MCM, Part IV, ¶35.c(2) (citing to 1 U.S.C. § 3, defining "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.").

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *See, e.g.,* United States v. Ortiz, 25 M.J. 570, 572-73 (A.F.C.M.R. 1987) (disconnecting electrical relay in aircraft's landing system constituted willful damage to government property under Article 108).

other punishment as a court-martial may direct; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1115 (Misconduct or neglect of ship officers) and § 2280 (violence against maritime navigation) set forth a similar offenses to Article 110.

By contrast, 18 U.S.C. § 32 (Destruction of aircraft or aircraft facilities) sets forth an offense not covered by Article 110. Additionally, 10 U.S.C. § 950t(23) (Military Commissions Act) also sets forth an offense regarding the crime of hijacking or hazarding a vessel or aircraft, which is broader than Article 110.

6. Recommendation and Justification

Recommendation 110: Amend Article 110 to also address improper hazarding of aircraft.

No punitive article currently addresses the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States, caused by the improper hazarding of an aircraft.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to offenses involving aircraft in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1022. IMPROPER HAZARDING OF VESSEL OR AIRCRAFT.

Section 910 of title 10, United States Code (article 110 of the Uniform Code of Military Justice), is amended to read as follows:

"§910. Art. 110. Improper hazarding of vessel or aircraft

"(a) WILLFUL AND WRONGFUL HAZARDING.—Any person subject to this chapter who, willfully and wrongfully, hazards or suffers to be hazarded any vessel or

[6] MCM, Part IV, ¶34.e.

aircraft of the armed forces shall be punished by death or such other punishment as a court-martial may direct.

"(b) NEGLIGENT HAZARDING.—Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1022 would amend Article 110 (Improper hazarding of vessel) to also prohibit improper hazarding of an aircraft. Although other punitive articles, such as Article 92 (dereliction of duty) and Article 108 (destruction of military property) may speak to the loss or destruction of government property generally, no punitive article captures the act of improper hazarding of an aircraft, considering the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States. This amendment would align the conduct involving an aircraft with the maximum punishments authorized under Article 110.

Article 111 (Current Law) – Drunken or Reckless Operation of Vehicle, Aircraft, or Vessel
10 U.S.C. § 911

1. Summary of Proposal

This proposal would amend Article 111 to specify a breath or blood alcohol content (BAC) limit of .08, consistent with federal and state practice. This Report also proposes that it be redesignated as Article 113 as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial implementing the new Article 111 as necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 111 prohibits operating or controlling any vehicle, vessel, or aircraft (1) in a reckless manner; (2) while drunk or impaired; or (3) when the alcohol concentration in the accused's blood equals or exceeds 0.10 grams of alcohol per 1000 milliliters of blood, or 0.10 grams per 210 liters of breath (or lower, depending upon the jurisdiction of the offense).

3. Historical Background

Drunk driving first appeared in military law as a designated offense under Article 96 of the 1948 Articles of War.[1] In 1950, the offense of drunk driving was included in the UCMJ as Article 111.[2] The statute has been amended five times since the UCMJ was enacted in 1950: in 1986 it was amended to prohibit the operation of a vehicle "while impaired by a substance,"[3] in 1992 it was expanded to cover the "operation of a vehicle, aircraft or vessel,"[4] and in 1993 the blood alcohol level of 0.10 grams "or more" of alcohol was specified.[5] In 2003, Article 111 was amended to provide that the BAC limit could be .010 or the limit under the law of the state where the conduct occurred, whichever was lower.[6]

[1] *See* MCM App. 4, ¶142 (1949).

[2] Article 111, UCMJ (1950).

[3] NDAA FY 1986, Pub. L. No. 99-570, Title III, § 3055, 100 Stat. 3207, 3207-76 (1986).

[4]NDAA FY 1993, Pub. L. No. 102-484, Div. A, Title X, § 1066(a)(1), 106 Stat. 2315, 2506 (1992).

[5] NDAA FY 1994, Pub. L. No. 103-160, Div. A, Title V, § 576(a), 107 Stat. 1547, 1677 (1993).

[6] NDAA FY 2004, Pub. L. No. 108-136, Div. A, Title V, § 552, 117 Stat. 1392, 1481-82 (2003).

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Drunken or Reckless Operation of Vehicle, Aircraft, or Vessel: if the operation of the vehicle resulted in personal injury, dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 18 months; otherwise, bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 13 (Laws of States adopted for areas within federal jurisdiction), the "Assimilative Crimes Act" adopts state law on federal enclaves of exclusive or concurrent federal jurisdiction. As a matter of federal regulation, 0.08 is the applicable blood alcohol level on federal national parks.[8]

Since July of 2004, every state, the District of Columbia, and Puerto Rico have enacted 0.08 BAC per se drunk driving laws.[9]

6. Recommendation and Justification

Recommendation 111: Redesignate Article 111 as Article 113, and amend it to specify a breath or BAC limit of .08.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to driving under the influence in the civilian sector insofar as practicable in military criminal practice.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1025. LOWER BLOOD ALCOHOL CONTENT LIMITS FOR CONVICTION OF DRUNKEN OR RECKLESS OPERATION OF VEHICLE, AIRCRAFT, OR VESSEL.

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[7] MCM, Part IV, ¶35.e.

[8] 36 C.F.R. § 4.23 (enacted 6 August 2003) (current through 5 March 2015).

[9] *See* GOVERNOR'S HIGHWAY SAFETY ADMIN, DRUNK DRIVING LAWS (March 2015), *available at* http://www.ghsa.org/html/stateinfo/laws/impaired_laws.html last accessed 11 March 2015.

Subsection (b)(3) of section 913 of title 10, United States Code (article 113 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(9), is amended—

(1) by striking "0.10 grams" both places it appears and inserting "0.08 grams"; and

(2) by adding at the end the following new sentence: "The Secretary may by regulation prescribe limits that are lower than the limits specified in the preceding sentence, if such lower limits are based on scientific developments, as reflected in Federal law of general applicability.".

9. Sectional Analysis

Section 1025 would amend Article 113 (Drunken or reckless operation of vehicle, aircraft, or vessel), as transferred and redesignated by Section 1001(9), *supra*, to align the BAC limits in the offense to the prevailing legal standard in the United States. All other jurisdictions in the United States, including all fifty states, each territory, the District of Columbia, and the national parks, have established BAC limits no higher than .08 for the offense of drunk driving. The amendment also would provide flexibility for the Department of Defense to prescribe lower breath/blood alcohol limits should scientific developments or other factors in the civilian sector lead to lower limits.

Article 111 (New Location) – Leaving Scene of Vehicle Accident

10 U.S.C. § 911

1. Summary of Proposal

This proposal would migrate the offense of fleeing the scene of any accident currently addressed under Article 134 (the General Article)[1] to a new enumerated punitive article, Article 111 (Leaving scene of vehicle accident). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶82, the offense of fleeing the scene of an accident requires a showing that the accused was either the driver or senior passenger of a vehicle involved in an accident and that the accused either drove away from the scene of the accident or wrongfully ordered or permitted the driver to do so, without providing assistance to an injured victim or providing identification. "Senior passenger" means a person who was the superior commissioned or noncommissioned officer of the driver.[2] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated "fleeing the scene of an accident" as an Article 134 offense in the 1951 MCM.[3] The offense targets reckless or negligent disregard for the safety of others; it does not require an identifiable victim to be placed in apprehension of receiving immediate bodily harm.[4] The offense is intended to deter drivers of motor vehicles involved in accidents from seeking to avoid civil or criminal liability by escaping before their identity can be established, to avoid leaving persons injured in an accident in distress or danger for want of proper medical care, and to avoid the prejudice to good order and

[1] MCM, Part IV, ¶82.

[2] MCM, Part IV, ¶82.b(2)(c).

[3] MCM 1951, App. 6c, ¶142.

[4] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.26[2] at 828 (2d ed. 2012).

discipline or discredit to the armed forces that would occur if servicemembers committed hit-and-run accidents with impunity.[5]

4. Contemporary Practice

The primary distinction between military and civilian "hit and run" statutes is that the UCMJ imposes an affirmative responsibility on the senior passenger (if a noncommissioned or commissioned officer) to prevent a driver from fleeing the scene after an accident. The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Fleeing the Scene of an Accident: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[6]

5. Relationship to Federal Civilian Practice

There is no direct Title 18 counterpart to "fleeing the scene of an accident." However other federal law (*i.e.* District of Columbia Statute § 50-2201.05(a)(1)-(3)), criminalizes fleeing the scene of an accident, and every state has adopted a "hit and run" statute.[7]

6. Recommendation and Justification

Recommendation 134-82: Migrate the offense of fleeing the scene of an accident in Article 134 (MCM, Part IV, ¶82) to Article 111.

Migrating the fleeing the scene of an accident offense to its own enumerated punitive article: Article 111, aligns the offense with similar subject matter offenses involving misuse of vehicles under the UCMJ. While the UCMJ is unique in imposing liability upon a "senior passenger" for a "hit and run", fleeing the scene of an accident itself is a well recognized area of criminal law. Accordingly, this offense does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1023. LEAVING SCENE OF VEHICLE ACCIDENT.

[5] *Id.* (citing United States v. Thiel, 18 C.M.R. 934, 936-38 (A.F.C.M.R. 1955)).

[6] MCM, Part IV, ¶82.e.

[7] *See* http://traffic.findlaw.com/traffic-tickets/leaving-the-scene-of-an-accident-hit-and-run-state-laws.html *last accessed* 16 March 2015.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 910 (article 110 of the Uniform Code of Military Justice), as amended by section 1022, the following new section (article):

"§911. Art. 111. Leaving scene of vehicle accident

"(a) DRIVER.—Any person subject to this chapter—

"(1) who is the driver of a vehicle that is involved in an accident that results in personal injury or property damage; and

"(2) who wrongfully leaves the scene of the accident—

"(A) without providing assistance to an injured person; or

"(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.

"(b) SENIOR PASSENGER.—Any person subject to this chapter—

"(1) who is a passenger in a vehicle that is involved in an accident that results in personal injury or property damage;

"(2) who is the superior commissioned or noncommissioned officer of the driver of the vehicle or is the commander of the vehicle; and

"(3) who wrongfully and unlawfully orders, causes, or permits the driver to leave the scene of the accident—

"(A) without providing assistance to an injured person; or

"(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1023 would amend Article 111 and retitle the statute as "Leaving scene of vehicle accident." As amended, the statute would include the offense of "Fleeing the scene of an accident," which would be migrated from Article 134 (the General article) to place it next to other offenses under the UCMJ involving misuse of vehicles. The offense of fleeing the scene of an accident is a well-recognized concept in criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 112 – Drunk on Duty
10 U.S.C. § 912

1. Summary of Proposal

This proposal would retain the current provisions under Article 112, with minor changes, and would migrate into the statute the offenses of incapacitation for the performance of duties and drunk prisoner, both of which currently are addressed under Article 134 (the General Article).[1] Article 112 would be retitled as "Drunkenness and Other Incapacitation Offenses." Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing Article 112.

2. Summary of the Current Statute

Article 112 prohibits a person, other than sentinels or look-outs (who are covered in Article 113), from being drunk on duty.

3. Historical Background

American military law has forbidden drunkenness while on duty since the Revolutionary War.[2] Article 112 was derived from Article 85 of the 1948 Articles of War and Article 8 of the 1930 Articles for Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

According to the MCM, "duty" means military duty and includes any duty that a servicemember is legally required to perform by a superior authority; a commander is always on duty when in the actual exercise of command; in areas of active hostilities, all members of a command are continuously on duty.[5]

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[1] MCM, Part IV, ¶¶75, 76. The offenses of incapacitating drunkenness for the performance of duties, drunk and disorderly conduct, and drunk prisoner are discussed in this Report under "Article 112 – Drunk on Duty – Addendum."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 611 (photo reprint 1920) (2d ed. 1896) (tracing the origin for AW 38 of 1874 back to AW 20 of 1775).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶36.c(2); *see also* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.32[2] at 425 (2d ed. 2012) (citations omitted).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Drunk on Duty: bad-conduct discharge, forfeiture of all pay and allowances and confinement for 9 months.[6]

5. Relationship to Federal Civilian Practice

Article 112 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 112: Migrate the offenses of incapacitation for the performance of duties and drunk prisoner (currently in Article 134, MCM, Part IV, ¶¶75, 76) to Article 112.

This proposal would align similar offenses under Article 112.

The exclusion of sentinels and lookouts from liability under Article 112 (Drunk on Duty) would be removed in order to resolve the ambiguity between Articles 112 and 113 (Misbehavior of sentinel) concerning the "on post" status of sentinels and lookouts.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1024. DRUNKENNESS AND OTHER INCAPACITATION OFFENSES.

Section 912 of title 10, United States Code (article 112 of the Uniform Code of Military Justice), is amended to read as follows:

"§912. Art. 112. Drunkenness and other incapacitation offenses

"(a) DRUNK ON DUTY.—Any person subject to this chapter who is drunk on duty shall be punished as a court-martial may direct.

"(b) INCAPACITATION FOR DUTY FROM DRUNKENNESS OR DRUG USE.—Any person subject to this chapter who, as a result of indulgence in any alcoholic beverage or

[6] MCM, Part IV, ¶36.e.

any drug, is incapacitated for the proper performance of duty shall be punished as a court-martial may direct.

"(c) DRUNK PRISONER.—Any person subject to this chapter who is a prisoner and, while in such status, is drunk shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1024 would amend Article 112 and retitle the statute as "Drunkenness and other incapacitation offenses." As amended, Article 112 would include the offenses of "Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug" and "Drunk prisoner," which would be migrated from Article 134 (the General article). The express exclusion of sentinels and lookouts under Article 112 would be removed in order to resolve the ambiguity between Articles 112 and 113 concerning the "on post" status of sentinels and lookouts. The wrongfulness of being incapacitated for duty or as a prisoner is a well-recognized concept in military criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 112 – Drunkenness and Other Incapacitation Offenses – Addendum 1

(Drunkenness – Incapacitation for Performance of Duties through Prior Wrongful Indulgence in Intoxicating Liquor or any Drug)

1. Summary of Proposal

This proposal would migrate the offense of drunkenness (incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug) currently addressed under Article 134 (the General Article)[1] to Article 112 (Drunkenness and other incapacitation offenses). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM Part IV, ¶76, the offense of incapacitating drunkenness for performance of duties requires proof that the accused had wrongfully indulged in intoxicating liquor or any drug and, as a result, was incapacitated to properly perform certain duties. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized "drunken incapacitation for duty" via the "General Article" since the 1775 Articles of War.[2] Under the UCMJ, the President has designated drunken incapacitation for duty as an Article 134 offense since the 1951 MCM.[3]

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[1] MCM, Part IV, ¶76.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 722-23 (photo reprint 1920) (2d ed. 1896) (citations omitted) (noting "There can indeed rarely be an occasion when a soldier, or an officer, in camp or at a military post, may become intoxicated, and thus incapacitated for properly answering a call for duty, without rendering himself liable to be treated as an offender within the terms of [the General Article]."); *see also id*. at 727 ("Rendering himself unfit for duty by excessive use of spirituous liquors.") (citations omitted).

[3] MCM 1951, App. 6c, ¶135.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of incapacitating drunkenness for the performance of duties: forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.[4]

5. Relationship to Federal Civilian Practice

The offense of incapacitating drunkenness for the performance of duties is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 134-76: Migrate the offense of incapacitating drunkenness for the performance of duties (currently in Article 134, Part IV, ¶76), to Article 112.

Migrating the offense of drunken incapacitation for duty to Article 112 aligns the offense with the existing UCMJ drunkenness offense. Drunken incapacitation for duty is inherently prejudicial to good order and discipline. Accordingly, it does not rely upon the terminal element of Article 134 as the basis for its criminality.[5]

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

See Article 112 (Drunk on Duty), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 112 (Drunk on Duty), *supra*, at paragraph 9.

[4] MCM, Part IV, ¶76.e.

[5] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 112 – Drunkenness and Other Incapacitation Offenses – Addendum 2
(Drunk Prisoner)

1. Summary of Proposal

This proposal would migrate the offense of drunk prisoner currently addressed under Article 134 (the General Article)[1] to Article 112 (Drunkenness and other incapacitation offenses). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶75, the offense of drunk prisoner requires proof that the accused was drunk, disorderly, or both, upon a ship or some other place. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized "drunk and disorderly conduct" generally via the "General Article" since the 1775 Articles of War.[2] However, neither the Articles of War nor UCMJ Article 112 (Drunk on duty) addressed the circumstance of a drunk prisoner specifically. The President has designated "drunk prisoner" as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of drunk prisoner: forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.[4]

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[1] MCM, Part IV, ¶75.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 722 (photo reprint 1920) (2d ed. 1896) (citations omitted) ("Among 'disorders,' it may be noted here that simple *drunkenness* is in general a military offense in violation of this Article . . . it has always been a more heinous offence in the military than in the civil code.") (citations omitted).

[3] MCM 1951, App. 6c, ¶134.

[4] MCM, Part IV, ¶75.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1791 (Providing or Possessing Contraband in Prison) sets forth a similar offense to the offense of drunk prisoner.

6. Recommendation and Justification

Recommendation 134-75: Migrate the offense of drunk prisoner (currently in Article 134, Part IV, ¶75), to Article 112.

Migrating the offense drunk prisoner to Article 112 aligns the offense with the existing UCMJ drunkenness offenses. Drinking while incarcerated would ordinarily be in violation of confinement facility regulations. Accordingly, it is inherently prejudicial to good order and discipline and is not reliant upon the terminal element of Article 134 as the basis for its criminality. Prisoners using drugs, as opposed to alcohol, may be punished under Article 112a, Article 92, or Article 134 as appropriate.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 112 (Drunk on Duty), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 112 (Drunk on Duty), *supra*, at paragraph 9.

Article 112a – Wrongful Use, Possession, etc., of Controlled Substances

10 U.S.C. § 112a

1. Summary of Proposal

This Report recommends no change to Article 112a. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 112a.

2. Summary of the Current Statute

Article 112a prohibits the wrongful use, possession, manufacture, distribution, importation into or export out of the customs jurisdiction of the United States, or the introduction into an installation, vessel, vehicle, or aircraft any prohibited controlled substance.

3. Historical Background

The wrongful use or possession of a controlled substance was punished as a violation of the General Article under Article 96 of the 1948 Articles of War.[1] When the UCMJ was enacted in 1950, unlawful drug use and possession continued to be prosecuted as a violation of the General Article under Article 134.[2] Article 112a was enacted in 1983, prohibiting wrongful use and possession of certain controlled substances and incorporating prohibitions against other substances as defined by the Controlled Substances Act.[3] Article 112a has remained unchanged since then.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for offenses under Article 112a: dishonorable discharge, forfeiture of all pay and allowances, and, depending on the controlled substance and whether it was distributed, confinement for up to 15 years.[4] The services in some instances may also prosecute use and possession

[1] MCM, App. 4, ¶¶173, 182 (1949).

[2] MCM App. 6, ¶¶136, 137 (1951).

[3] Military Justice Act of 1983, Pub. L. No. 98-209, § 8(a), 97 Stat. 1393, 1403-04 (1983); *see also* 21 U.S.C. 812.

[4] MCM, Part IV, ¶37.e.

of intoxicating substances not proscribed by the Controlled Substances Act as a violation of Article 92 if the substance has been prohibited by a lawful general order or regulation.[5]

5. Relationship to Federal Civilian Practice

21 U.S.C. § 841(a) (Drug abuse prevention and control) sets forth similar offenses to Article 112a. The primary distinction between Title 21 drug offenses and UCMJ drug offenses are: (1) Title 21 does not separately criminalize unauthorized "use" of a controlled substance;[6] and (2) the MCM provides for increased punishments when a drug offense occurs in a deployed environment.[7]

6. Recommendation and Justification

Recommendation 112a: No change to Article 112a.

In view of the well-developed case law addressing Article 112a's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] *See e.g.* OPNAVINST 5350.4D (Navy Alcohol and Drug Abuse Prevention and Control instruction, prohibiting use of controlled substance analogues (designer drugs), the illicit use of inhalants (huffing), the illicit use of anabolic steroids, and salvia divinorum.).

[6] 22 U.S.C. § 841(a)(1) (criminalizing the manufacture, distribution, or dispersion, or possession with intent to manufacture, distribute, or dispense, a controlled substance).

[7] *See* MCM, Part IV, ¶37.e(2)(b) (enhancing maximum punishments for any Article 112a drug offense by five years when that offense is committed in a "imminent danger/hostile fire" zone as designated under 37 U.S.C. § 310).

Article 113 (Current Law) – Misbehavior of Sentinel

10 U.S.C. § 913

1. Summary of Proposal

This proposal would redesignate Article 113 as Article 95 and migrate into the statute the loitering portion of the sentinel or lookout offenses, currently addressed under Article 134 (the General Article).[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 95 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 113 prohibits misbehavior by a person on guard duty or while a lookout. Misbehavior includes being found drunk or sleeping, or leaving a post before being regularly relieved. In time of war, the offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

American military law has criminalized misconduct by a sentinel since the 1775 Articles of War.[2] The current Article 113 was derived from Article 86 of the 1948 Articles of War and Article 4 of the 1930 Articles for Government of the Navy.[3] The word lookout was added to cover Navy terminology.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

4. Contemporary Practice

Article 113 encompasses only those specifically assigned as sentinels or lookouts, and is not applicable to an officer or enlisted person of the guard, or of a ship's watch.[6]

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[1] MCM Part IV, ¶104. The loitering portion of the offense of "offenses against or by sentinel or lookout" is discussed in this Report under "Article 113 Misbehavior of a Sentinel or Lookout – Addendum."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 616 (photo reprint 1920) (2d ed. 1896) (discussing the importance of the sentinel's alertness as the essence of their service).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1230 (1949).

[4] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 266 (1951).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.34[2] at 447(2d ed. 2012).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Misbehavior of Sentinel or Lookout: if committed in time of war, death or such other punishment as a court-martial may direct; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[7]

5. Relationship to Federal Civilian Practice

Article 113 is a unique military offense, with no counterpart in federal civilian practice.

6. Recommendation and Justification

Recommendation 113: Redesignate Article 113 as Article 95 and migrate the loitering portion of the sentinel or lookout offenses (currently in Article 134, the General Article, Part IV, ¶104) to the new Article 95.

This change would align similar offenses under Article 95.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

See Article 95 (Offenses by sentinel or lookout), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 95 (Offenses by sentinel or lookout), *supra*, at paragraph 9.

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[7] MCM, Part IV, ¶38.e.

Article 114 (Current Law) – Dueling
10 U.S.C. § 914

1. Summary of Proposal

This proposal would retain the existing provisions in Article 114 and migrate into the statute the offenses of reckless endangerment, dueling, discharge of firearm/endangering human life, and carrying of a concealed weapon—all of which are currently addressed under Article 134 (the General Article).[1] Article 114 would be retitled as "Endangerment offenses." Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 114 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 114 prohibits fighting, promoting, or failing to report a challenge to a duel. A duel is defined as combat between two persons for private reasons fought with deadly weapons by prior agreement.

3. Historical Background

American military law has criminalized dueling since the 1775 Articles of War.[2] The current Article 114 was derived from Article 91 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Dueling: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.[5]

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[1] MCM, Part IV, ¶¶81, 100a, and 112. The offenses of reckless endangerment, discharge of firearm/endangering human life, and carrying of a concealed weapon are discussed in this Report under "Article 114 – Dueling – Addendum."

[2] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 590 (2nd ed. 1920) (tracing the origins of the American military "dueling" offense from Article of War XI of 1775).

[3] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶39.e.

5. Relationship to Federal Civilian Practice

Article 114 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 114: Migrate the offenses of reckless endangerment, discharge of firearm/endangering human life, and carrying of a concealed weapon (currently in Article 134, the General Article, MCM, Part IV, ¶¶81, 100a, and 112) to Article 114.

In view of the well-developed case law addressing Article 114's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1026. ENDANGERMENT OFFENSES.

Section 914 of title 10, United States Code (article 114 of the Uniform Code of Military Justice), is amended to read as follows:

"§914. Art. 114. Endangerment offenses

"(a) RECKLESS ENDANGERMENT.—Any person subject to this chapter who engages in conduct that—

"(1) is wrongful and reckless or is wanton; and

"(2) is likely to produce death or grievous bodily harm to another person;

shall be punished as a court-martial may direct.

"(b) DUELING.—Any person subject to this chapter—

"(1) who fights or promotes, or is concerned in or connives at fighting a duel; or

"(2) who, having knowledge of a challenge sent or about to be sent, fails to report the facts promptly to the proper authority;

shall be punished as a court-martial may direct.

"(c) FIREARM DISCHARGE, ENDANGERING HUMAN LIFE.—Any person subject to this chapter who, willfully and wrongly, discharges a firearm, under circumstances such as to endanger human life shall be punished as a court-martial may direct.

"(d) CARRYING CONCEALED WEAPON.—Any person subject to this chapter who unlawfully carries a dangerous weapon concealed on or about his person shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1026 would migrate the offenses of "Reckless endangerment," "Firearm, discharging—willfully, under such circumstances as to endanger human life," and "Weapon: concealed carrying" from Article 134 (the General article) to the redesignated Article 114 (Endangerment offenses), which currently includes the offense of "Dueling." The wrongfulness of failing to maintain weapon discipline is a well-recognized concept in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 114 – Endangerment Offenses
Addendum 1
(Reckless Endangerment)

1. Summary of Proposal

This proposal would migrate the offense of reckless endangerment currently addressed under Article 134 (the General Article)[1] to the newly redesignated Article 114 (Endangerment offenses). Part II of the Report will address changes to the Manual for Courts-Martial provisions implementing the new Article 114 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶100a, the offense requires proof that the accused was wrongfully engaged in reckless or wanton conduct that was likely to produce death or grievous bodily harm to another person. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated reckless endangerment as an Article 134 offense in 1999.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Reckless Endangerment: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.[3]

5. Relationship to Federal Civilian Practice

There is no Title 18 equivalent offense to reckless endangerment. However, the Model Penal Code contains the offense of recklessly endangering another person,[4] which is similar to the military offense of reckless endangerment.

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[1] MCM, Part IV, ¶100a.

[2] MCM 2000, Part IV, ¶100a; App. 23 (Analysis of Punitive Articles) at A23-21 (citing United States v. Woods, 28 M.J. 318, 319-20 (C.M.A. 1989) (HIV positive servicemember convicted under Article 134 after continuing to have unprotected sex with partners without disclosing his HIV status contrary to direction of his military superiors as the policy basis for the President designating "reckless endangerment" as an offense).

[3] MCM, Part IV, ¶100a.e.

6. Recommendation and Justification

Recommendation 134-100a: Migrate the offense of reckless endangerment (currently in Article 134, MCM, Part IV, ¶100a), to Article 114.

Migrating the reckless endangerment offense to Article 114 (Endangerment Offenses) aligns the offense with other similar subject matter offenses which are also migrating to Article 114 (*e.g.* willful discharge of a firearm endangering human life). Wanton and reckless conduct creating a likelihood of inflicting death or grievous bodily harm is a recognized concept in criminal law. Accordingly, reckless endangerment does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 9.

[4] MODEL PENAL CODE § 211.2 (Recklessly Endangering Another Person).

Article 114 – Endangerment Offenses – Addendum 2
(Firearm, Discharging – Willfully, Under Such Circumstances as to Endanger Human Life)

1. Summary of Proposal

This proposal would migrate the offense of willful discharge of a firearm/endangering human life currently addressed under Article 134 (the General Article)[1] to Article 114 (Endangerment offenses). Part II of this Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶81 the offense requires a showing that the accused discharged a firearm, willfully and wrongfully, and that the discharge was under circumstances such as to endanger human life. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated "willful discharge of a firearm/endangering human life" as an Article 134 offense in 1951.[2] The offense targets reckless or negligent disregard for the safety of others; it does not require an identifiable victim to be placed in apprehension of receiving immediate bodily harm.[3]

4. Contemporary Practice

The offense requires that there is a "reasonable potential" that human life could have been endangered.[4] It does not require human life to have been actually endangered by the willful discharge of a firearm. Under this standard, firing a weapon into an empty barracks room that an accused does not know to be unoccupied[5]; firing several rounds across a highway

[1] MCM, Part IV, ¶81.

[2] MCM 1951, App. 6c, ¶141.

[3] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.26[2] at 828 (2d ed. 2012).

[4] MCM, Part IV, ¶81.c.

[5] United States v. Potter, 35 C.M.R. 243, 245 (C.M.A. 1965).

used as a main supply route;[6] firing rounds into the ground near other soldiers[7] all constitute "willful discharge of a firearm under circumstances to threaten human life."

The President, under Article 56, has prescribed the following maximum punishment for the offense of Willful Discharge of Firearm/Endangering Human Life: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.[8]

5. Relationship to Federal Civilian Practice

The offense of willful discharge of firearm/endangering human life has no direct federal civilian counterpart. Many states, however, have some type of comparable law, such as firing a weapon within city limits, or firing from a vehicle or building.[9]

6. Recommendation and Justification

Recommendation 134-81: Migrate the offense of willful discharge of firearm/endangering human life (currently in Article 134, MCM, Part IV, ¶81), to Art. 114.

Migrating the willful discharge of a firearm under circumstances to endanger human life offense to Article 114 Endangerment Offenses logically aligns the offense with the other offenses involving criminal use of firearms under the UCMJ. Failure to maintain weapon discipline that creates an actual risk of bodily harm to others is inherently prejudicial to good order and discipline. Accordingly, this offense does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 9.

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[6] United States v. Christey, 6 C.M.R. 379, 381 (A.B.R. 1952).

[7] United States v. Simmons, 5 C.M.R. 119, 125 (C.M.A. 1952).

[8] MCM, Part IV, ¶81.e.

[9] *See, e.g.,* Ark. Code Ann. § 5-74-107; Colo. Rev. Stat. Ann. § 18-12-107.5; Fla. Stat. Ann. § 790.15; Idaho Code Ann. § 18-3317; Neb. Rev. Stat. § 28-1212.02; S.C. Code Ann. § 16-23-440; Va. Code Ann. § 18.2-279.

Article 114 – Endangerment Offenses – Addendum 3
(Weapon Concealed/Carry)

1. Summary of Proposal

This proposal would migrate the offense of carrying a concealed weapon currently addressed under Article 134 (the General Article)[1] to the newly redesignated Article 114 (Endangerment offenses). Part II of the Report will address changes in the Manual provisions implementing the new Article 114.

2. Summary of the Current Statute.

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶112, the offense requires a showing that the accused unlawfully carried a dangerous concealed weapon on or about his person. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated carrying a concealed weapon as an Article 134 offense in the 1951 MCM.[2]

4. Contemporary Practice

Unlawfully carrying a concealed weapon is a general-intent crime; there is no requirement to prove that the accused intended to violate the law so long as he had the intent to conceal the weapon on or about his person.[3] A weapon is "concealed" under this offense if it is readily available to the accused and is kept from sight.[4]

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[1] MCM, Part IV, ¶112.

[2] MCM 1951, App. 6c, ¶175.

[3] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.60[3][b][i] (2d ed. 2012); *see also* United States v. Bishop, 2 M.J. 741, 744-45 (A.F.C.M.R. 1977) (accused, mistakenly believing it was not a violation to carry a concealed weapon on post, concealed a .45 caliber pistol under the driver's seat of his vehicle; court held that his lack of intent to violate the law was irrelevant to the issue of guilt for a general intent crime but was an appropriate matter for mitigation).

[4] MCM, Part IV, ¶112.c.(1).

The President, under Article 56, has prescribed the following maximum punishment for the offense of carrying a concealed weapon: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.[5]

5. Relationship to Federal Civilian Practice

Federal law authorizes only law enforcement officers and retired law enforcement officers to carry concealed weapons. 18 U.S.C. §§ 926B, 926C. Most states authorize lay citizens to carry a concealed weapon, but require persons to have a permit.[6]

6. Recommendation and Justification

Recommendation 134-112: Migrate the offense of carrying a concealed weapon (currently in Article 134, MCM, Part IV, ¶112), to Article 114.

Migrating the carrying a concealed weapon offense logically aligns the offense with the other weapons based offenses under the newly reconstituted Article 114. Carrying a concealed weapon, without authorization, is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.[7]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by reducing the potential for unnecessary litigation in this area.

8. Legislative Proposal

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 114 (Dueling) (Endangerment offenses, as amended), *supra*, at paragraph 9.

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[5] MCM, Part IV, ¶112.e.

[6] *See generally* BUREAU OF ALCOHOL TOBACCO AND FIREARMS PUBLICATION 5300.5, STATE LAWS AND PUBLISHED ORDINANCES- FIREARMS, 31ST ED. (2011) (providing a database for state concealed firearms laws) *available at* http://www.atf.gov/publications/firearms/state-laws/31st-edition/index.html (last visited 20 March 2015); 79 AMERICAN JURISPRUDENCE (SECOND): WEAPONS AND FIREARMS § 13 (2015) (discussing state court decisions upholding the validity of state "concealed weapons" permits requirements).

[7] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 115 (Current Law) – Malingering
10 U.S.C. § 915

1. Summary of Proposal

This Report recommends a technical change to the existing Article 115, and proposes that it be redesignated as Article 83. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 83 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 115 prohibits the feigning of illness, physical disablement, mental lapse or derangement, or from intentionally inflicting self-injury, to avoid work, duty, or service.

3. Historical Background

Article 115 was derived primarily from the proposed Article 9 of the 1930 Articles for the Government of the Navy.[1] Since the UCMJ was enacted in 1950,[2] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Malingering: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[3]

5. Relationship to Federal Civilian Practice

Article 115 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 115: Redesignate Article 115 as Article 83, with a technical amendment.

In view of the well-developed case law addressing Article 115's provisions, other than this technical amendment, change to the statute's contents is not necessary.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949); *see also* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 730 (photo reprint 1920) (2d ed. 1896) (citing several prior malingering cases, dating from the late 1860s, as an example of a cognizable offense under the "general article" (then) AW 62 of 1874) (citations omitted).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] MCM, Part IV, ¶40.e.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1004. MALINGERING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 882 (article 82 of the Uniform Code of Military Justice), as amended by section 1003, the following new section (article):

"§883. Art. 83. Malingering

"Any person subject to this chapter who, with the intent to avoid work, duty, or service—

"(1) feigns illness, physical disablement, mental lapse, or mental derangement; or

"(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.".

8. Sectional Analysis

Section 1004 would transfer and redesignate Article 115 (Malingering) as Article 83, and would make a technical change to the statute's provisions. The technical change would replace the words "for the purpose of avoiding" with the words "with the intent to avoid" to better address the mens rea required for the offense.

Article 115 (New Location) – Communicating Threats

10 U.S.C. § 915

1. Summary of Proposal

This proposal would migrate the offense of communicating a threat, and the offense of communicating a threat or hoax designed or intended to cause panic or public fear, both of which currently are addressed under Article 134 (the General Article)[1] to a new stand-alone enumerated punitive article, Article 115 (Communicating threats).[2] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 115.

2. Narrative Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶110 ("Threat, communicating"), the offense requires a showing that the accused wrongfully communicated a threat to injure the person, property, or reputation of another person. Under MCM, Part IV, ¶ 109 ("Threat or hoax designed to cause panic or public fear"), the offense requires a showing that the accused wrongfully communicated a threat to commit harm by means of an explosive or other material, or maliciously communicated a false threat to commit harm by those means. Because these offenses fall under Article 134, the prosecution also must prove that the charged misconduct was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated communicating a threat as an Article 134 offense in the 1951 MCM.[3] The President designated communicating a threat or hoax designed to create public fear as an Article 134 offense in the 1984 MCM.[4] Prior to that time, threats or hoaxes designed to create public fear were charged as a violation of Article 134 under either Clause 1 or Clause 3.[5] The offense covers bomb threats and bomb hoaxes.

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[1] MCM, Part IV, ¶110 and ¶109.

[2] The additional offense to be realigned under this article is discussed in its portion of the Report.

[3] MCM 1951, App. 6, ¶ 171.

[4] MCM 1984, Part IV, ¶109.

[5] *See* United States v. Mayo, 12 M.J. 286, 293 (C.M.A. 1982), *overruled on other grounds by* United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

4. Contemporary Practice

To fall within the prohibition of communicating a threat under current law, the accused must both understand that the language constitutes a threat (regardless of whether the accused actually intended to do the injury threatened) and that a reasonable person would perceive the statement to be a true threat.[6] A declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute the offense.[7]

Under current law, a bomb threat occurs when an accused wrongfully communicates certain language amounting to a threat to commit harm by means of an explosive.[8] A bomb hoax occurs when an accused knowingly and maliciously communicates or conveys certain false information concerning an attempt being made or to be made by means of an explosive to kill, injure, or intimidate a person, or to damage or destroy certain property.[9] The law does not require the accused to have actually intended to carry out the threat.[10]

The President, under Article 56, has prescribed the following maximum punishment for the offense of communicating a threat: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years. The President has prescribed the following maximum punishment for an offense involving a threat or hoax designed or intended to cause panic or public fear: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[11]

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[6] MCM, Part IV, ¶ 110.b.(1), c. MCM, Part IV, ¶ 110.b.(2); *see* United States v. Bewsey, 54 M.J. 893, 896 (N-M.Ct.Crim.App. 2001) (to determine whether a threat has been communicated the objective test should ask whether a reasonable fact finder could determine beyond a reasonable doubt that the victim under a reasonable person standard would perceive the accused's statement to be a threat.). The Supreme Court recently utilized similar reasoning in an appeal arising from a defendant's conviction under 18 U.S.C. § 875(c), addressing the mental state requirement for communicating a threat. *See* Elonis v. United States, No. 13–983, slip. op. at 11 (June 1, 2015). The Court found that the mental state requirement for a threat "turns on whether a defendant knew the *character* of what was sent, not simply its contents and context." *Id.* (emphasis in original).

[7] *See* MCM, Part IV, ¶ 110.c; United States v. Phillips, 42 M.J. 127, 130 (C.A.A.F. 1995) (A statement may declare an intention to injure and thereby . . . establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter).

[8] MCM, Part IV, ¶ 109.b.(1).

[9] MCM, Part IV, ¶ 109.b.(2).

[10] MCM, Part IV, ¶ 109.c.(1).

[11] MCM, Part IV, ¶109.e.

5. Relationship to Federal Civilian Practice

Title 18, Chapter 41 of the U.S. Code addresses offenses involving threats and extortion. 18 U.S.C. § 844(e), which proscribes bomb threats, sets forth a similar offense to the Article 134 offense of Threat or hoax designed or intended to cause panic or public fear.

6. Recommendation and Justification

Recommendation 134-109: Migrate the offense of "Threat, communicating," along with the offense of "Threat or hoax designed or intended to cause panic or public fear," both currently in Article 134 (MCM, Part IV, ¶¶109, 110), to the newly redesignated Article 115.

The offenses of Threat, communicating, and Threat or hoax designed or intended to cause panic or public fear are well-recognized concepts in criminal law. Accordingly, these offenses do not rely upon additional proof of the terminal element of Article 134 as the basis for their criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1027. COMMUNICATING THREATS.

Section 915 of title 10, United States Code (article 115 of the Uniform Code of Military Justice), is amended to read as follows:

"§915. Art. 115. Communicating threats

"(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct.

"(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injure the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a

biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct.

"(c) COMMUNICATING FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct. As used in the preceding sentence, the term 'false threat' means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.".

9. Sectional Analysis

Section 1027 would migrate the offenses of "Threat, communicating," and "Threat or hoax designed or intended to cause panic or public fear" from Article 134 (the General article) to the redesignated Article 115 (Communicating threats). These offenses are well-recognized concepts in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality. The guidance in the Manual for Courts-Martial will continue to reflect the limitations on these offenses established in the applicable case law.[12]

[12] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 116 – Riot or Breach of Peace
10 U.S.C. § 916

1. Summary of Proposal

This Report recommends no change to Article 116. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 116.

2. Summary of the Current Statute

Article 116 prohibits causing or participating in a riot or breach of the peace.

3. Historical Background

American military law has criminalized both rioting, and a superior officer's failure to quell a riot, since the 1775 Articles of War.[1] The current Article 116 was derived from Article 89 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Riot or Breach of Peace: for riot, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years; for breach of peace, forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[4]

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[1] *See* WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 588, 657, 726 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the military "riot" offense to the 1775 Articles of War; recognizing that failure of an officer to quell a riot involving soldiers violated AW 24, 54, 62 of 1874) (footnote omitted).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 267-68 (1951) (noting that military law traditionally punished riots, but the phrase "breach of peace" was a new offense in military justice).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶41.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2101 (Riots) sets forth a similar offense to Article 116.[5] The primary difference between the Title 18 and UCMJ "riot" statutes is that the UCMJ contains a lower level "breach of the peace" offense whereas Title 18 does not.

6. Recommendation and Justification

Recommendation 116: No change to Article 116.

In view of the well-developed case law addressing Article 116's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This recommendation supports the MJRG Operational Guidance of minimizing change when established military law is similar to the law applied in U.S. district courts.

[5] *Compare* MCM, Part IV, ¶41.c(1) (defining "riot" as "a *tumultuous disturbance of the peace* by three or more persons assembled together in furtherance of a common purpose . . . in such a *violent and turbulent* manner as to cause or be calculated to cause a public terror") (emphasis added) *with* 18 U.S.C. § 2102(a) (defining "riot" as "an act or act of violence by one or more persons part of an assemblage of three or more persons, which acts shall constitute a *clear and present danger* to the property of any other person or to the person of any individual") (emphasis added).

Article 117 – Provoking Speeches or Gestures
10 U.S.C. § 917

1. Summary of Proposal

This Report recommends no change to Article 117. Part II of the Report will consider whether any changes are needed to the provisions in Part IV of the Manual for Courts-Martial implementing Article 117.

2. Summary of the Current Statute

Article 117 prohibits using provoking or reproachful words or gestures towards any other person subject to the UCMJ.

3. Historical Background

American military law has criminalized "provoking speeches and gestures" since the 1775 Articles of War.[1] The current Article 117 was derived from Article 90 of the 1948 Articles of War and Article 8 of the 1930 Articles for the Government of the Navy.[2] Since the UCMJ was enacted in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Provoking Speeches or Gestures: forfeiture of two-thirds pay per month for 6 months and confinement for 6 months.[4]

5. Relationship to Federal Civilian Practice

Article 117 is a unique military offense with no direct federal civilian counterpart. The Supreme Court has held that the First Amendment does not protect some types of speech, such as "fighting words" or other communications designed to incite violence.[5]

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[1] WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS 629 (photo reprint 1920) (2d ed. 1896) (tracing the origins of the provoking speeches and gestures to the 1775 and 1776 Articles of War); *see also* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 5.38[2] at 468 (2d ed. 2012) (citations omitted).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1231 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] MCM, Part IV, ¶42.e.

6. Recommendation and Justification

Recommendation 117: No change to Article 117.

In view of the well-developed case law addressing Article 116's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding state statute against offensive name calling in public) *with* Cohen v. California, 403 U.S. 15 (1971) (jacket displaying vulgarity did not state fighting words because they were not directed at any particular person).

Article 118 – Murder
10 U.S.C. § 918

1. Summary of Proposal

This Report recommends a technical amendment to conform Article 118 to this Report's proposed clarification that forcible sodomy is punishable under Article 120. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 118.

2. Summary of the Current Statute

Article 118 prohibits the unlawful killing of a human being, when done by a premeditated design to kill, with an intent to kill or inflict great bodily harm, by an act that is inherently dangerous to another and evinces a wanton disregard of human life; or while engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery or aggravated arson. The offense is punishable by death or such other punishment as a court-martial may direct.

3. Historical Background

Until 1916, courts-martial exercised jurisdiction over murder only when the murder occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1916, Congress amended the Articles of War to provide jurisdiction over murder and rape anytime the murder occurred outside of the territorial boundaries of the United States.[2] The current Article 118 applies anywhere, anytime, and was derived from Article 92 of the 1948 Articles of War and Article 6 of the 1930 Articles for the Government of the Navy.[3] The statute was amended in 1992,[4] 2006,[5] and 2011,[6] to add the

[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (photo reprint 1920) (2d ed. 1896). Under the Articles of War, outside of wartime, prosecution of "common law" offenses like murder was permissible only under the "general article" dependent upon a showing that the underlying common law crime was prejudicial to good order and discipline under the circumstances. *Id.* at 671 (discussing AW 58 and AW 62 "the general article" of 1874).

[2] AW 92 of 1916 (extending court-martial jurisdiction to murder and rape when committed outside of the territorial boundaries of the United States).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 12231(1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 194, 268-69 (1951) (noting deletion of the prior restraints on court-martial jurisdiction over murder).

[4] NDAA FY 1993, Pub. L. 102-484, Div. A, Title X, § 1066(b), 106 Stat. 2315, 2506 (1992).

[5] NDAA FY 2006, Pub. L. No. 109-163, Div. A, Title V, § 552(d), 119 Stat. 3136, 3263 (2006).

felony offenses of rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child for the commission of felony murder.

4. Contemporary Practice

Article 118 has prescribed the following maximum punishment for the offense of premeditated murder (Article 118(1)): death or life imprisonment.[7] All other forms of murder under Article 118 (2)-(4) are punishable by "any punishment less than death."[8]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1111 (Murder) sets forth a similar offense to Article 118.

6. Recommendation and Justification

Recommendation 118: Amend Article 118(4) to conform to the proposed amendment to Article 125 (which has the effect of clarifying that forcible sodomy is included within the sexual offenses punishable under Article 120).

This technical change reflects the revision of Article 125 proposed by this Report.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1028. TECHNICAL AMENDMENT RELATING TO MURDER.

Section 918(4) of title 10, United States Code (article 118(4) of the Uniform Code of Military Justice), is amended by striking "forcible sodomy.".

9. Sectional Analysis

Section 1028 would make a technical amendment to Article 118 (Murder).

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[6] NDAA FY 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1410 (2011).

[7] MCM, Part IV, ¶43.e(1).

[8] *Id.* at ¶43.e(2).

Article 119 – Manslaughter
10 U.S.C. § 919

1. Summary of Proposal

This Report recommends no change to the existing Article 119. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing Article 119.

2. Summary of the Current Statute

Article 119 prohibits the unlawful and intentional killing of another human being in the heat of sudden passion caused by adequate provocation (manslaughter), and the unlawful killing of another by culpable negligence or while perpetrating or attempting to perpetrate an offense (involuntary manslaughter) other than those offenses named in Article 118 (Murder).

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over manslaughter only when the killing occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over manslaughter and a list of other common law offenses.[2] The current Article 119 was derived from Article 93 of the 1948 Articles of War.[3] Since the UCMJ was enacted in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Manslaughter: dishonorable discharge, forfeiture of all pay and allowances, and,

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (photo reprint 1920) (2d ed. 1896). Under the Articles of War, outside of wartime, prosecution of "common law" offenses like murder was permissible only under the "general article" dependent upon a showing that the underlying common law crime was prejudicial to good order and discipline under the circumstances. *Id.* at 671 (discussing AW 58 and AW 62 "the general article" of 1874).

[2] AW 93 of 1920.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949); LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 194, 270 (1951) (noting Article 119 created "involuntary manslaughter" as a military offense for the first time).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

depending on whether the victim was a child and whether the killing was voluntary or involuntary, confinement for up to 20 years.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1112 (Manslaughter) sets forth a similar offense to Article 119.

6. Recommendation and Justification

Recommendation 119: No change to Article 119.

In view of the well-developed case law addressing Article 119's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[5] MCM, Part IV, ¶44.e.

Article 119a – Death or Injury of an Unborn Child
10 U.S.C. § 919a

1. Summary of Proposal

This Report recommends no change to Article 119a. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions implementing Article 119a.

2. Summary of the Current Statute

Article 119a prohibits the unlawful killing or infliction of bodily injury to an unborn child. Article 119a does not apply to a consensual abortion, medical treatment for mother or the unborn child, or to the mother of the unborn child.[1]

3. Historical Background

Article 119a was added to the UCMJ in 2004.[2] The statute has remained unchanged since then.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Death or Injury of an Unborn Child: such punishment, other than death, as a court-martial may direct.[3]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1841 (Protection of unborn children) sets forth a similar offense to Article 119a.

6. Recommendation and Justification

Recommendation 119a: No change to Article 119a.

The case law concerning Article 119a does not demonstrate a current need for statutory revisions.

[1] MCM, Part IV, ¶44a.c(1)(a)-(c).

[2] Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, § 3(a), 118 Stat. 569 (2004).

[3] MCM, Part IV, ¶44a.e.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 119b (New Provision) – Child Endangerment
10 U.S.C. § 919b

1. Summary of Proposal

This proposal would migrate the offense of child endangerment currently addressed under Article 134 (the General Article)[1] to the new enumerated punitive article, Article 119b (Child endangerment). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 119b necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In Part IV, ¶68a, the offense of child endangerment requires a showing that the accused had a duty to care for a child under the age of sixteen years, and that the accused endangered the child's mental or physical health, safety, or welfare, through design or culpable negligence. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The Court of Appeals for the Armed Forces first recognized "child endangerment" (without resulting physical harm) as qualifying misconduct under Article 134 in 2003.[2] The President then designated "child endangerment" as an Article 134 offense in the 2008 MCM.[3]

4. Contemporary Practice

At least thirty-three States and the District of Columbia currently have child endangerment statutes.[4]

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[1] MCM, Part IV, ¶68a.

[2] United States v. Vaughn, 58 M.J. 29, 32-33 (C.A.A.F. 2003) (holding military custom, state statutes, and military regulations provided the accused constructive notice that leaving a child unattended for prolonged number of hours violated Article 134).

[3] MCM 2008, Part IV, ¶68a.

[4] *Vaughn*, 58 M.J. at 32 n.2, Appendix (citing 33 States and the District of Columbia child endangerment statutes).

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Child Endangerment: dishonorable discharge, forfeiture of all pay and allowances, and, if the endangerment was by design, confinement for 8 years.[5]

5. Relationship to Federal Civilian Practice

The military offense of child endangerment has no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 134-68a: Migrate the offense of child endangerment in Article 134 (MCM, Part IV, ¶68a) to the new Article 119b.

Migrating the offense of child endangerment to the new Article 119b aligns the offense with Article 119a—Death or Injury of an Unborn Child. Child endangerment is well recognized in criminal law. Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1029. CHILD ENDANGERMENT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 919a (article 119a of the Uniform Code of Military Justice), the following new section (article):

"§919b. Art. 119b. Child endangerment

"Any person subject to this chapter—

"(1) who has a duty for the care of a child under the age of 16 years; and

"(2) who, through design or culpable negligence, endangers the child's mental or physical health, safety, or welfare;

[5] MCM, Part IV, ¶68a.e.

shall be punished as a court-martial may direct.”.

9. Sectional Analysis

Section 1029 would create a new section, Article 119b (Child endangerment), and would migrate the offense of “Child endangerment” from Article 134 (the General article) into the new statute. The new section would align with the closely related offense of “Death or injury of an unborn child” under Article 119a. The offense of child endangerment is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the “terminal element” of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of “migration,” *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 120 – Rape and Sexual Assault Generally
10 U.S.C. § 920

1. Summary of Proposal

This proposal would conform the definition of "sexual act" in Article 120(g)(1) to the definition of "sexual act" in the comparable Title 18 provision, 18 U.S.C. § 2246(2). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by this statutory amendment.

Any changes in addition to the definition of "sexual act" should await further recommendations of the Judicial Proceedings Panel. The Judicial Proceedings Panel is conducting an extensive examination of whether further changes to Article 120 are warranted and recommended the Secretary of Defense establish a subcommittee of experts for that purpose.[1] The Judicial Proceedings Panel is also examining whether the definitions of rape and sexual assault should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.[2] Part II of the Report will address changes in the Manual provisions necessitated by this statutory amendment.

2. Summary of the Current Statute

Article 120 prohibits rape, sexual assault, aggravated sexual contact, and abusive sexual contact on another person.

Article 120(g)(1)(B) defines "sexual act", in pertinent part, as "(b) penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

3. Historical Background

Until 1916, courts-martial exercised jurisdiction over "rape" only when the rape occurred in wartime or under the General Article (*i.e.* "conduct prejudicial to good order and discipline").[3] In 1916, Congress amended the Articles of War to provide jurisdiction over

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[1] JUDICIAL PROCEEDINGS PANEL INITIAL REPORT 14-15 (February 4, 2015) [hereinafter JPP INITIAL REPORT].

[2] NDAA FY 2014, Pub. L. No. 113–66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013).

[3] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (1920 photo reprint) (2d ed. 1896). Under the Articles of War, outside of wartime, prosecution of "common law" offenses like murder was permissible only under the "general article" dependent upon a showing that the underlying common law

murder and rape anytime the offense occurred outside of the territorial boundaries of the United States.[4] In the UCMJ as enacted in 1950,[5] Congress provided for worldwide applicability of all offenses under the Code.[6] The current Article 120 applies anywhere, anytime, and was derived from Article 92 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[7] The statute was amended in 1992[8], in 1996,[9] in 2006,[10] in 2011,[11] and in 2013.[12]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of "Rape and Sexual Assault Generally" under Article 120: for rape, dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole; for sexual assault, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years; for aggravated sexual contact, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years; and for abusive sexual contact, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.[13]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2241 (Aggravated sexual abuse) and § 2441 (War crimes) set forth similar offenses to Article 120.

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crime was prejudicial to good order and discipline under the circumstances. *Id.* at 671 (discussing Articles 58 and 62 (the General Article) of the 1874 Articles of War).

[4] AW 92 of 1916.

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

[6] Article 5 of the UCMJ provides: "This chapter applies in all places."

[7] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226-27 (1949).

[8] NDAA FY 1993, Pub. L. No. 102-484, Div. A, Title X, § 1066(c), 106 Stat. 2315, 2506 (1992).

[9] NDAA FY 1996, Pub. L. No. 104-106, Div. A, Title XI, § 1113, 110 Stat. 186, 462 (1996).

[10] NDAA FY 2006, Pub. L. No. 109-163, Div. A, Title V, § 552(a)(1), 119 Stat. 3136, 3257-63 (2006).

[11] NDAA FY 2012 Pub. L. No. 112-81, Div. A, Title V, § 541(a), 125 Stat. 1298, 1404-10 (2011).

[12] NDAA FY 2013, Pub. L. No. 112-239, Div. A, Title X, § 1076(f)(9), 126 Stat. 1632, 1952 (2013).

[13] Exec. Order 13643 of May 15, 2013. The current version of the MCM (2012) does not yet contain the President's maximum punishment designations for Article 120.

The current definition of "sexual act" in Article 120(g)(1)(B) includes non-sexual acts. Specifically, the definition extends to "the penetration, however slight of the vulva or anus or mouth of another *by any part of the body or by any object.*"[14]

18 U.S.C. § 2246(2), the comparable provision in Title 18, defines the term "sexual act" in a similar context to mean "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse, or gratify the sexual desire of any person."

6. Recommendation and Justification

Recommendation 120: Amend the definition of "sexual act" in Article 120(g)(1) to conform it to 18 U.S.C. § 2246(2)(c).

As there are no military specific reasons for having a unique military definition for "sexual act," this report conforms Article 120 to its civilian counterpart.[15]

7. Relationship to Objectives and Related Provisions

This proposal is consistent with MJRG Terms of Reference to employ the standards and procedures applicable to federal criminal law in the civilian sector insofar as practicable in military criminal practice.

Any changes in addition to amending the definition of "sexual act" should await further recommendations of the Judicial Proceedings Panel, which is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose.[16]

The Judicial Proceedings Panel is also examining whether the definitions of rape and sexual assault should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act by abusing their position in the chain of command to gain access to or coerce the other person. [17] This Report proposes a new statute, Article 93a, to prohibit improper acts with recruits and trainees, addressing a specific category of abuse of position in the chain of command.

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[14] Article 120(g)(1)(B) (emphasis added).

[15] The Judicial Proceedings Panel, a Federal Advisory Committee established by Congress (*see* NDAA FY 2014, Pub. L. No. 113–66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013)) is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose. JPP INITIAL REPORT at 14-15. In that context, this report recommends no further amendments to Article 120, beyond the conforming changes recommended herein.

[16] JPP INITIAL REPORT at 14-15.

[17] *Id*. at 15, 37-42.

8. Legislative Proposal

SEC. 1030. DEFINITION OF SEXUAL ACT FOR RAPE AND SEXUAL ASSAULT OFFENSES.

(a) RAPE AND SEXUAL ASSAULT GENERALLY.—Paragraph (1) of section 920(g) of title 10, United States Code (article 120(g) of the Uniform Code of Military Justice), is amended to read as follows:

"(1) SEXUAL ACT.—The term 'sexual act' means—

"(A) contact between the penis and the vulva or the penis and the anus, and for purpose of this subparagraph contact involving the penis occurs upon penetration, however slight;

"(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

"(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.".

(b) [Omitted. *See* Article 120b.]

9. Sectional Analysis

Section 1030 would amend the definition of "sexual act" in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of "sexual act" under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).

Article 120a (Current Law) – Stalking
10 U.S.C. § 920a

1. Summary of Proposal

This proposal would update the current law to address cyberstalking and threats to intimate partners. Article 120a would be redesignated as Article 130. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 130 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 120a prohibits a person from engaging in a course of conduct that would cause a reasonable person to fear death or bodily harm, including sexual assault, to themselves or a member of their immediate family.

3. Historical Background

Article 120a was added to the UCMJ in 2006 based on the 2000 version of 18 U.S.C. § 2261A (Interstate Stalking).[1] While Article 120a has remained unchanged since 2006,[2] 18 U.S.C. § 2261A was amended by the Violence Against Women and Department of Justice Reauthorization Act of 2006 and the Violence Against Women Reauthorization Act of 2013.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of stalking: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2261A (Interstate stalking) sets forth a similar offense to Article 120a. 18 U.S.C. § 2261A differs from Article 120a in that the Title 18 offense requires a specific intent to "kill, injure, harass, or intimidate" and also prohibits conduct that "causes . . . or would be reasonably expected to cause substantial emotional distress." Section 2261A also has been broadened to cover the use of technology in stalking, or cyber-stalking.[5] Paragraph (1) of §

[1] NDAA FY 2006, Pub. L. No. 109-163, § 551(a)(1), 119 Stat. 3256 (2006).

[2] 10 U.S.C. § 920a.

[3] Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Title I, § 114(a), 119 Stat. 2987 (2006); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title I, § 107(b), 127 Stat. 77 (2013).

[4] MCM, Part IV, ¶45a.e.

[5] *See* 18 U.S.C. § 2261A(2).

2261A requires that a defendant "engages in conduct." Paragraph (2) of § 2261A and Article 120a require a "course of conduct.."[6]

6. Recommendation and Justification

Recommendation 120a: Amend Article 120a to address cyberstalking and threats to intimate partners, and redesignate Article 120a as Article 130.

As amended, the offense of "stalking" would include conduct that uses surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system. The offense also would include a definition of "intimate partner" to cover threats to former spouses and individuals who have been in an intimate relationship with the targeted person.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to stalking in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1043. STALKING.

Section 930 of title 10, United States Code (article 130 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(11), is amended to read as follows:

"930. Art. 130. Stalking

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual

[6] Several Courts of Appeals have rejected constitutional challenges to the recent amendments to 18 U.S.C. § 2261A. *See, e.g.*, United States v. Osinger, 753 F.3d 939 (9th Cir. 2014); United States v. Petrovic, 701 F.3d 849 (8th Cir. 2012); United States v. Shrader, 675 F.3d 300 (4th Cir. 2012).

assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

"(2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

"(3) whose conduct induces reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

is guilty of stalking and shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'conduct' means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

"(2) The term 'course of conduct' means—

"(A) a repeated maintenance of visual or physical proximity to a specific person;

"(B) a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person; or

"(C) a pattern of conduct composed of repeated acts evidencing a continuity of purpose.

"(3) The term 'repeated', with respect to conduct, means two or more occasions of such conduct.

"(4) The term 'immediate family', in the case of a specific person, means—

"(A) that person's spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

"(B) any other person living in his or her household and related to him or her by blood or marriage.

"(5) The term 'intimate partner' in the case of a specific person, means—

"(A) a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or

"(B) a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.".

9. Sectional Analysis

Section 1043 would redesignate Article 120a (Stalking) as Article 130, and would update current law to address cyberstalking and threats to intimate partners. The proposed amendments would continue to address stalking activity involving a broad range of misconduct including, but not limited to, sexual offenses. The redesignated stalking statute would not preempt service regulations that specify additional types of misconduct that

may be punishable at court-martial, including under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of misconduct from being prosecuted under other appropriate Articles, such as under Article 134 (General article). These uniquely military offenses are available to address similar misconduct that, for example, causes substantial emotional distress or targets professional reputation.

Article 120a (New Location) – Mails: Deposit of Obscene Matter

10 U.S.C. § 920a

1. Summary of Proposal

This proposal would migrate the offense of depositing or causing to be deposited obscene materials in the mails currently under Article 134 (the General Article)[1] to the new Article 120a (Mails: deposit of obscene matter) as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶94 the offense requires a showing that the accused wrongfully deposited or caused to be deposited in the mails certain matter for mailing and delivery. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President designated depositing obscene matters in the mail as an Article 134 offense in the 1951 MCM.[2] Minor amendments to definitions in the offense were made in the 1984 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Depositing or Causing to be Deposited Obscene Materials in the Mails: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1461 (Mailing obscene or crime-inciting matter) sets forth a similar offense to the offense of depositing or causing to be deposited obscene materials in the mails.

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[1] MCM, Part IV, ¶94.

[2] MCM 1951, App. 6c, ¶153.

[3] MCM 1984, Part IV, ¶94.

[4] MCM, Part IV, ¶94.e.

6. Recommendation and Justification

Recommendation 134-94: Migrate the offense of depositing or causing to be deposited obscene materials in the mails (currently under Article 134, the General Article, MCM, Part IV, ¶94), to create a new Article 120a.

The offense of depositing or causing to be deposited obscene materials in the mails is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1031. DEPOSIT OF OBSCENE MATTER IN THE MAIL.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 920 (article 120 of the Uniform Code of Military Justice), the following new section (article):

"§920a. Art. 120a. Mails: deposit of obscene matter

"Any person subject to this chapter who, wrongfully and knowingly, deposits obscene matter for mailing and delivery shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1031 would redesignate Article 120a as "Mails: deposit of obscene matter" and would migrate the offense of "Mails: depositing or causing to be deposited obscene materials in" from Article 134 (the General article) into the redesignated statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration" see *supra*, Exec. Sum., and *infra* Art. 134 (Gen. Art.).

Article 120b – Rape and Sexual Assault of a Child
10 U.S.C. § 920b

1. Summary of Proposal

This proposal would conform the definition of "sexual act" in Article 120b(h)(1) to the definition of "sexual act" in the comparable Title 18 provision, 18 U.S.C. § 2246(2). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 120b prohibits the rape, sexual assault, or commission of "lewd acts" with a child. Lewd acts under the statute fall into four categories: (1) any sexual contact (as defined by Article 120(g)); (2) exposing one's genitalia, buttocks, or nipples to a child (either in person or via any communication technology); (3) communicating "indecent language" to a child, by any means[1]; and (4) a "catch all" indecent conduct provision.[2]

3. Historical Background

Until 2012, the UCMJ addressed rape and sexual assault of a child under Article 120.[3] The current Article 120b was enacted in 2012.[4] It consolidates the child sexual offenses contained in the 2007 version of Article 120(b), (d), (f), (g), (i), (j).[5]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for Article 120b: dishonorable discharge, forfeiture of all pay and allowances, and confinement

[1] Article 120b(h)(5)(A)-(C).

[2] "Indecent conduct" would capture any act directed at a child that "amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120b(h)(5)(D).

[3] From 1950 to 2006 Article 120 classified child sex offenses as "carnal knowledge." 10 U.S.C. § 920(b) (2006) *amended by* NDAA FY 2006, Pub. L. No. 109-16 Div A, Title V, Subtitle E, § 552, 119 Stat. 3136, 3256 (2006)).

[4] NDAA FY 2012, Pub. L. No. 112–81, Div. A, Title V, Subtitle D, §541, 125 Stat. 1298, 1404-11 (2011).

[5] MCM, App. 23 (Analysis of Punitive Articles) at A23-16 to 17.

for life without eligibility for parole.[6] The Secretary of Defense lists every offense under Article 120b as a sex offender registration offense.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2241 (Aggravated sexual abuse), §2243 (Sexual abuse of a minor or ward), §2244 (Abusive sexual contact), and §2251 (Sexual exploitation of children) set forth similar offenses to Article120b.

The current definition of "sexual act" in Article 120b(h)(1) does not include all of the acts proscribed by its federal counterpart definition, 18 U.S.C. 2246(2)(D). Specifically, §2246(2)(D) extends to intentional touching of the genitalia without requiring insertion of the genitalia into the mouth or "penetration, however slight" as Article 120b currently does.[8]

6. Recommendation and Justification

Recommendation 120b: Amend the definition of "sexual act" in Article 120b(h)(1) to conform it to 18 U.S.C. § 2246(2)(A)-(D).

This Report already recommends conforming the definition of "sexual act" under Article 120 to the federal definition in 18 U.S.C. §2246. Consistent with that recommendation, and as there is no military specific reason for having a unique military definition for "sexual act" as it pertains to a child under the age of 16, this report also recommends conforming the definition of "sexual act" in Article 120b to conform with the federal definition of "sexual act" set forth in 18 U.S.C. §2246.[9]

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Operational Guidance to employ the standards and procedures applicable to federal criminal law in the civilian sector insofar as practicable in military criminal practice.

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[6] *See* Exec. Order No. 13643, 78 Fed. Reg. 98, 29559, 29606 (May 25, 2013). The current version of the MCM (2012 edition) does not yet contain the President's maximum punishments for Article 120b as promulgated in the May 2013 Executive Order.

[7] Dep't of Defense Instruction (DoDI) 1325.07 Administration of Military Correctional Facilities and Clemency and Parole Authority, Appendix 4 to Enclosure – Table 6 (March 11, 2013).

[8] Article 120b(h)(1) adopts the Article 120(g)(1) definition for sexual act, which by its terms is currently limited to vaginal sex, anal sex, fellatio, and digital penetration of the mouth, vulva, or anus. 10 U.S.C. § 920(g)(1)(A)-(B).

[9] The Judicial Proceedings Panel, a Federal Advisory Committee established by Congress (*see* NDAA FY 2014, Pub. L. No. 113–66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013)) is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose. JPP INITIAL REPORT at 14-15. In that context, this report recommends no further amendments to Article 120b, beyond the conforming changes recommended herein.

8. Legislative Proposal

SEC. 1030. DEFINITION OF SEXUAL ACT FOR RAPE AND SEXUAL ASSAULT OFFENSES.

(a) [Omitted. *See* Article 120.]

(b) RAPE AND SEXUAL ASSAULT OF A CHILD.—Section 920b of title 10, United States Code (article 120b of the Uniform Code of Military Justice), is amended in subsection (h)(1) by inserting before the period at the end the following:

", except that the term 'sexual act' also includes the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person".

9. Sectional Analysis

Section 1030 would amend definition of "sexual act" in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of "sexual act" under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).

Article 120c – Other Sexual Misconduct
10 U.S.C. § 920c

1. Summary of Proposal

This Report recommends no change to the current Article 120c. Part II of the Report will consider whether any changes are needed to the Manual for Courts-Martial provisions for this statute.

2. Summary of the Current Statute

Article 120c prohibits the indecent viewing, recording, or broadcasting of the private area of another person. In addition, the statute prohibits forcible pandering and indecent exposure.

3. Historical Background

Article 120c was enacted in 2012.[1] Prior to 2011, the offenses were defined in the 2007 Article 120(k), (l), and (n).[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for Article 120c: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 12 years.[3]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1801 (Video Voyeurism) sets forth a similar offense to Article 120c(a) (Indecent Viewing/Visual Recording/Broadcasting). 18 U.S.C. §§ 1591 and 2422 set forth similar offenses to Article 120c(b) (Forcible Pandering). There is no Title 18 equivalent to Article 120c(c) (Indecent Exposure).

6. Recommendation and Justification

Recommendation 120c: No change to Article 120c.

The case law concerning Article 120c does not demonstrate a current need for statutory revisions.

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[1] NDAA FY 2012, Pub. L. No. 112-81, Div. A, Title V, Subtitle D, § 541, 125 Stat. 1298, 1409 (2011).

[2] MCM, Part IV, App. 23 (Analysis of Punitive Articles) at A23-16 to 17.

[3] MCM, Part IV, ¶45c.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by minimizing change to an area recently revised by Congress.

Article 121 – Larceny and Wrongful Appropriation
10 U.S.C. § 921

1. Summary of Proposal

This Report recommends no change to Article 121. Part II of the Report will address any changes that may be needed in the Manual for Courts-Martial provisions implementing Article 121.

2. Summary of the Current Statute

Article 121 prohibits the wrongful taking, obtaining, or withholding from the possession of another person of any item of personal property with the intent to permanently (larceny) or temporarily (wrongful appropriation) deprive or defraud another person of the use and benefit of the property.

3. Historical Background

American military law has criminalized larceny of government property since the 1874 Articles of War.[1] Until 1920, however, courts-martial exercised jurisdiction over larceny of non-military property only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over larceny and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 121 was derived from Article 93 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

4. Contemporary Practice

Article 121 combines the common law theories of larceny into a single statute, including: larceny by trick and device, larceny by asportation, obtaining property by false pretenses,

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 697-98, 704 (photo reprint 1920) (2d ed. 1896). (discussing AW 60 of 1874 (frauds and larcenies of government property)).

[2] *See id.* at 666-67, 670-71 (discussing AW 58 (extending jurisdiction over "common law" crimes, including larceny, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

and embezzlement.[6] The President, under Article 56, has prescribed the following maximum punishment for the offense of Larceny and Wrongful Appropriation: if the stolen property was military property and its value was over $500.00, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to 5 years.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 641 (Public money, property, or records) sets forth a similar offense to Article 121.

6. Recommendation and Justification

Recommendation 121: No change to Article 121.

In view of the well-developed case law addressing Article 121's provisions, a statutory change is not necessary, except for the proposed new offense that would address offenses involving credit cards, debit cards, and other access devices.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Offenses involving credit cards and debit cards, charged at courts-martial in current practice under Article 121 as a larceny by false pretenses, are addressed in this Report in "Article 121a – Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices."

[6] LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 270 (1951).

[7] MCM, Part IV, ¶46.e.

Article 121a (New Provision) – Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices

10 U.S.C. § 921a

1. Summary of Proposal

This proposal would create a new statute: Article 121a (Fraudulent use of credit cards, debit cards, and other access devices) similar to 18 U.S.C. § 1029 (Fraud and related activity in connection with access devices). Part II of this Report will address the Manual for Courts-Martial provisions implementing the new Article 121a.

2. Summary of the Current Statute

This proposal would create a new statute.

3. Historical Background

The theft and misuse of "access devices," such as credit, debit, or ATM cards or numbers has been prosecuted at courts-martial as a larceny by false pretenses under Article 121 (Larceny). The offense requires a correct identification of the victim incurring the ultimate loss, which may be difficult to determine, because of the complex contractual arrangements of the cardholder, the bank, and the merchant. The theft or misuse of a credit or debit card to obtain goods is "usually a larceny of those goods from the merchant offering them," while such misuse to obtain money from an automated teller machine is "usually a larceny of money from the entity presenting the money."[1]

4. Contemporary Practice

Reliance on the offense of larceny to address credit card offenses has proved problematic, particularly in terms of identifying whether the cardholder, the merchant, or the bank is the victim.[2]

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[1] MCM, Part IV, ¶46.c.(1)(h)(vi).

[2] *See, e.g.*, United States v. Lubasky, 68 M.J. 260, 263-264 (C.A.A.F. 2010) (accused's unauthorized use of credit cards to obtain cash advances and goods was a larceny against the cards' issuers or the business establishments where the goods were purchased, not against the cards' owner); United States v. Cimball-Sharpton, 73 M.J. 299, 302 (C.A.A.F. 2014) (victim of accused's credit card larceny was the Air Force, which paid for the unauthorized charges, rather than bank which issued the card or merchants which sold the goods purchased.); United States v. Endsley, (sum. disp.) __ M.J. __, No. 15-0202/AR (C.A.A.F. 14 January 2015) (the proper victims were the merchants who provided the goods upon false pretenses, not the debit cardholder), *reversing* 73 M.J. 909 (A. Ct. Crim. App. 2014).

5. Relationship to Federal Civilian Practice

In the 1980s, nearly every state, the District of Columbia, and the federal government enacted legislation specifically penalizing the misuse of credit cards and other access devices.[3] 18 U.S.C. § 1029 (Fraud and related activity in connection with access devices) sets forth a similar offense to the proposed Article 121a. The statute focuses on the wrongfulness of a misuse of a credit or debit card, done without authorization for personal gain; it avoids the need to identify the victim suffering the ultimate loss. The approach in 18 U.S.C. § 1029 presents a practical alternative to charging access-device related offenses as a larceny under the UCMJ.

6. Recommendation and Justification

Recommendation 121a: Enact Article 121a.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to fraudulent use of credit cards, debit cards, and other access devices in the civilian sector insofar as practicable in military criminal practice.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by addressing ambiguities in the current Article 121 case law concerning offenses involving credit cards, debit cards, and other access devices, thereby reducing the potential for unnecessary litigation in this area.

8. Legislative Proposal

SEC. 1032. FRAUDULENT USE OF CREDIT CARDS, DEBIT CARDS, AND OTHER ACCESS DEVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921 (article 121 of the Uniform Code of Military Justice), the following new section (article):

[3] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, VOL. 3, § 19.7(j)(6) (2d ed. 2003). For an index of state statutes addressing credit card and other access device-related offenses see *State Credit Card Fraud Laws, available at* http://statelaws.findlaw.com/criminal-laws/credit-card-fraud.html.

"§921a. Art. 121a. Fraudulent use of credit cards, debit cards, and other access devices

"(a) IN GENERAL.—Any person subject to this chapter who, with intent to defraud, uses—

"(1) a stolen credit card, debit card, or other access device;

"(2) a revoked, cancelled, or otherwise invalid credit card, debit card, or other access device; or

"(3) a credit card, debit card, or other access device without the authorization of a person whose authorization is required for such use;

to obtain money, property, services, or anything else of value shall be punished as a court-martial may direct.

"(b) DEFINITION.—In this section (article), the term 'access device' has the meaning given that term in section 1029 of title 18.".

9. Sectional Analysis

Section 1032 would create a new section, Article 121a (Fraudulent use of credit cards, debit cards, and other access devices). Article 121a is designed specifically to address the misuse of credit cards, debit cards, and other electronic payment technology, also known as "access devices." This article is modeled on 18 U.S.C. § 1029. It would provide a more effective and efficient means of prosecuting crimes committed with credit cards, debit cards, and other access devices than under current practice, in which such crimes are prosecuted as a larceny by false pretenses under Article 121 (Larceny and wrongful appropriation). When a government-issued credit card, debit card, or other access device is misused, the authorized sentence can be addressed in the Manual through the President's delegated powers under Article 56, which is the current sentencing approach for theft of government property under Article 121.

Article 121b (New Provision) – False Pretenses to Obtain Services

10 U.S.C. § 921b

1. Summary of Proposal

This proposal would migrate the offense of obtaining services under false pretenses currently addressed under Article 134 (the General Article)[1] to the new enumerated punitive article, Article 121b (False pretenses to obtain services). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 121b necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶78, the offense is similar to the offenses of larceny or wrongful appropriation except that the object of the obtaining is services, for example telephone services, rather than money, an item of personal property, or items of value of any kind. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Traditionally, American military law did not recognize "theft of services" as a type of larceny punishable at courts-martial.[2] The President did not initially designate an "obtaining services under false pretenses" offense under Article 134 in the 1951 MCM.[3] In 1965, the Court of Military Appeals first recognized "obtaining services under false pretense" as qualifying misconduct under Article 134.[4] The President designated obtaining services under false pretenses as an offense under Article 134 in the 1968 MCM.[5]

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[1] MCM, Part IV, ¶78.

[2] *See* DAVID SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES §7.23[2] at 812 (2d ed. 2012) (noting "The offense of obtaining service under false pretense fills a prosecutorial void left open by U.C.M.J. Article 121.").

[3] *See* United States v. McCracken, 19 C.M.R. 876, 877 (A.F.B.R. 1955) (holding that obtaining the use of a rental car under false pretenses was not larceny within the meaning of Article 121); United States v. Jones, 23 C.M.R. 818, 821 (A.F.B.R. 1956) (theft of telephone services did not constitute Article 121 larceny).

[4] United States v. Herndon, 36 C.M.R. 8, 11 (C.M.A. 1965) (holding that theft of telephone services was akin to fraud and constituted "service discrediting" misconduct under Article 134).

[5] MCM 1968, App. 6c, ¶148.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Obtaining Services under False Pretenses: dishonorable discharge, forfeiture of all pay and allowances, and, depending on the value of the services obtained, confinement for up to 5 years.[6]

5. Relationship to Federal Civilian Practice

The offense of obtaining services by false pretenses under Article 134 has no direct federal civilian counterpart. However, Chapter 31, Title 18 of the U.S. Code includes a number of theft and embezzlement offenses that may address the conduct punishable under the Article 134 offense.

6. Recommendation and Justification

Recommendation 134-78: Redesignate the offense of obtaining services by false pretenses (currently in Article 134, MCM, Part IV, ¶78) as Article 121b.

Migrating the offense of obtaining services under false pretenses to its own enumerated punitive article: Article 121b, aligns the offense with the other UCMJ "larceny" offenses. Obtaining services by false pretenses is now well recognized in criminal law.[7] Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1033. FALSE PRETENSES TO OBTAIN SERVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921a (article 121a of the Uniform Code of Military Justice), as added by section 1032, the following new section (article):

[6] MCM 2012, Part IV, ¶78.e.

[7] *See* MODEL PENAL CODE §2.23.7 (1980).

"§921b. Art. 121b. False pretenses to obtain services

"Any person subject to this chapter who, with intent to defraud, knowingly uses false pretenses to obtain services shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1033 would create a new section, Article 121b (False pretenses to obtain services), and would migrate the offense of "False pretenses, obtaining services under" from Article 134 (the General article) into the new statute. This change would align the offense of false pretenses with the related UCMJ "larceny" offenses. Obtaining services by false pretenses is now well recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 122 – Robbery
10 U.S.C. § 922

1. Summary of Proposal

This proposal would amend Article 122 to conform to the offense of robbery under 18 U.S.C. § 2111. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 122 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 122 prohibits the taking of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company.

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over robbery only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over robbery and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[2] The current Article 122 was derived from Article 93 of the 1948 Articles of War.[3] The statute remains unchanged since the UCMJ was enacted in 1950.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Robbery: if committed with a firearm, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years; otherwise, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[5]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (2nd ed. 1920) (discussing AW 58 (extending jurisdiction over "common law" crimes, including robbery, in time of war) and AW 62 "the General Article" of 1874).

[2] AW 93 of 1920.

[3] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶47.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2111 sets forth a similar offense to Article 122. It differs from the UCMJ, however, in that it simply requires a forcible taking of property without requiring proof of an "intent to deprive permanently" because the gravamen of robbery is the forcible taking of another's property, in their presence.[6]

6. Recommendation and Justification

Recommendation 122: Amend Article 122 by removing the intent to permanently deprive requirement.

The gravamen of robbery is the forcible taking of another's property, not the duration of time the accused intends to possess the property. To align Article 122 with federal practice, Article 122 should be amended to remove "with the intent to steal" (*i.e.* permanently deprive) as a statutory prerequisite and convert it into a potential maximum punishment enhancer under the MCM.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by reducing the potential for unnecessary litigation in this area.

8. Legislative Proposal

SEC. 1034. ROBBERY.

Section 922 of title 10, United States Code (article 122 of the Uniform Code of Military Justice), is amended to read as follows:

"§922. Art. 122. Robbery

"Any person subject to this chapter who takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of

[6] Congress modeled the federal bank robbery statute on the definition of robbery contained in Blackstone's Commentaries. *See* Carter v. United States, 530 U.S. 255, 271 (2000) (recounting legislative history of 18 U.S.C. 2113) (citing 62 Stat. 796 (1948)). However, in 1948, Congress made two changes to this statute, deleting "feloniously" from what is now § 2113(a) and dividing the "robbery" and "larceny" offenses into their own separate subsections. Thus, Congress purposefully severed the "intent to permanently deprive" offense into a separate larceny statute, leaving the federal robbery statute to focus on the forcible taking.

a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.”.

9. Sectional Analysis

Section 1034 would amend Article 122 (Robbery) to conform the statute to the offense of robbery under 18 U.S.C. § 2111. Article 122 prohibits the taking of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a family member or others present. Article 122 would be amended to align with 18 U.S.C. § 2111 by removing the words “with the intent to steal” from the statute, thereby eliminating the requirement to show that the accused intended to permanently deprive the victim of his property. The amendments would focus the statute on the true gravamen of this offense: the forcible taking of the property by the accused from the victim, in the presence of the victim.

Article 122a (New Provision) – Receiving Stolen Property

10 U.S.C. § 922a

1. Summary of Proposal

This proposal would migrate the offense of receiving stolen property currently addressed under Article 134 (the General Article)[1] to the new punitive article, Article 122a (Receiving stolen property). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶106, the offense requires a showing that the accused wrongfully received, bought, or concealed stolen property of some value belonging to another person. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

Under the UCMJ, the President first designated knowingly receiving, buying, or concealing stolen property as an Article 134 offense in the 1951 MCM.[2]

4. Contemporary Practice

When an accused is not the actual thief who can be found liable as a principal to a larceny, then he may be convicted for receiving stolen property under Article 134. The President, under Article 56, has prescribed the following maximum punishment for the offense of Receiving Stolen Property: dishonorable discharge, forfeiture of all pay and allowances, and depending on the value of the stolen property, confinement for up to 3 years.[3]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 662 (Receiving stolen property within special maritime and territorial jurisdiction) sets forth a similar offense to the offense of receiving stolen property in Article 134.

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[1] MCM, Part IV, ¶106.

[2] MCM 1951, App. 6c, ¶169.

[3] MCM, Part IV, ¶106.e.

6. Recommendation and Justification

Recommendation 134-106: Migrate the offense of receiving stolen property (currently in Article 134, the General Article, MCM, Part IV, ¶106) to Article 122a.

The offense of receiving stolen property is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1035. RECEIVING STOLEN PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922 (article 122 of the Uniform Code of Military Justice), as amended by section 1034, the following new section (article):

"§922a. Art. 122a. Receiving stolen property

"Any person subject to this chapter who wrongfully receives, buys, or conceals stolen property, knowing the property to be stolen property, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1035 would create a new section, Article 122a (Receiving stolen property), and would migrate the offense of "Stolen property: knowingly receiving, buying, concealing) from Article 134 (the General article) into the new statute. The offense of receiving stolen property is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[4]

[4] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 123 (Current Law) – Forgery
10 U.S.C. § 923

1. Summary of Proposal

This Report recommends no change to Article 123, except to redesignate it as Article 105 as part of the realignment of the punitive articles. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing the new Article 105.

2. Summary of the Current Statute

Article 123 prohibits a person from falsely making or altering a signature to a writing which would, if genuine, impose a legal liability on another person or change his legal right or liability to his prejudice; it also prohibits a person from uttering, offering, issuing, or transferring such a writing, known by them to be so made or altered.

3. Historical Background

American military law has specifically criminalized forgery involving frauds against the government since the 1874 Articles of War.[1] Until 1920, courts-martial exercised jurisdiction over non-government related forgeries only when the offense occurred either in wartime or when charged as an offense "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over larceny and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 123 was derived from Article 93 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[4] The statute has remained unchanged since the UCMJ was enacted in 1950.[5]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 693, 697-98, 702 (photo reprint 1920) (2d ed. 1896) (discussing AW 60 of 1874 (frauds and larcenies of government property)).

[2] *See id.* at 666-67, 670-71 (discussing AW 58 of 1874 (extending jurisdiction over "common law" crimes, including larceny, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Forgery: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 470, et. seq (Counterfeiting and forgery) set forth similar offenses to Article 123.

6. Recommendation and Justification

Recommendation 123: No change to Article 105, except to redesignate it as Article 105.

In view of the well-developed case law addressing Article 123's provisions, change to the statute is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] MCM, Part IV, ¶48.e.

Article 123 (New Provision) – Offenses Concerning Government Computers

10 U.S.C. § 923

1. Summary of Proposal

This proposal would create a new enumerated Article 123 (Offenses concerning Government computers), similar to 18 U.S.C. § 1030 (Fraud and related activity in connection with computers). Part II of the Report will address the Manual provisions implementing the new Article 123.

2. Summary of the Current Statute

The proposal would create a new statute.

3. Historical Background

The proposal would create a new statute.

4. Contemporary Practice

If a computer crime is committed in the United States by a person subject to the UCMJ, military prosecutors can charge federal civilian offenses under Article 134, clause 3. But if the crime is committed elsewhere, the government is limited to charging the offense under Article 134, clause 1 (conduct prejudicial to good order and discipline) or clause 2 (service discrediting conduct), which require the government to charge and prove both the civilian offense and the terminal element of clause 1 or clause 2 when charging the federal statute. Prosecutors can also charge computer offenses under existing articles of the UCMJ, such as Article 92 (Failure to obey an order or regulation), with an authorized maximum confinement period of two years. Article 108 (Military property of the United States-sale, loss, destruction, or wrongful disposition) may also apply to misconduct involving government computers, with a maximum authorized confinement period of ten years.[1]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1030 (Fraud and related activity in connection with computers) sets forth a similar offense to the proposed Article 123, Computer Crime. The federal statute addresses conduct that targets computer systems.[2] The law protects computer systems from

[1] *See* United States v. Walter, 43 M.J. 879, 884-85 (N-M. Ct. Crim. App. 1996) (Article 108 definition of military property was broad enough to cover computer data base files).

[2] Charles Doyle, *Cybercrime: An Overview of 18 U.S.C. 1030 and Related Federal Criminal Laws*, CRS Report 97-1025 (2010).

unauthorized access, threats, damage, espionage, and from being corruptly used as instruments of fraud. Conspiracy to commit and attempts to commit these crimes are also crimes under 18 U.S.C. § 1030(b).[3]

Two terms are common to most prosecutions under section 1030, and are thus key definitions for applying the statute: "protected computer" and "authorization." The term "protected computer," defined at 18 U.S.C. § 1030(e)(2), is a statutory term of art, applicable to computers used in or affecting interstate or foreign commerce and computers used by the federal government and financial institutions. With respect to "authorization," persons who "exceed authorized access" are generally insiders (e.g., employees using a victim's corporate computer network),[4] while persons who access computers "without authorization" will typically be outsiders (e.g., hackers).[5]

6. Recommendation and Justification

Recommendation 123.1: Enact Article 123, Offenses concerning Government computers.

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to computer offenses in the civilian sector insofar as practicable in military criminal practice.

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Terms of Reference by incorporating practices used in U.S. district courts with respect to computer offenses.

8. Legislative Proposal

SEC. 1036. OFFENSES CONCERNING GOVERNMENT COMPUTERS.

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[3] *See* DEP'T OF JUSTICE, PROSECUTING COMPUTER CRIMES MANUAL 55-56 (2d ed.) (2010).

[4] Applying the definition of "exceeding authorized access" under 18 U.S.C. § 1030 has presented a recurrent challenge for federal courts. The most commonly litigated issue about "exceeding unauthorized access" in reported opinions is whether a particular defendant exceeded authorized access for a particular purpose. *See, e.g.*, United States v. John, 597 F.3d 263, 272 (5th Cir. 2010) ("Access to a computer and data that can be obtained from that access may be exceeded if the purposes for which the access has been given are exceeded."); *see also* United States v. Nosal, 676 F.3d 854, 864 (9th Cir. 2012) (phrase "exceeds authorized access," within the meaning of CFAA, is limited to access restrictions, not use restrictions). For a discussion of statutory definitions of "access" and "authorization," see Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003).

[5] *See* S. REP. NO. 99-432, at 10 (1986) (discussing section 1030(a)(5): "[I]nsiders, who are authorized to access a computer, face criminal liability only if they intend to cause damage to the computer, not for recklessly or negligently causing damage. By contrast, outside intruders who break into a computer could be punished for any intentional, reckless, or other damage they cause by their trespass."); *see also* S. REP. NO. 104-357, at 11 (1996); United States v. Phillips, 477 F.3d 215, 219 (5th Cir. 2007) (discussing legislative history); Int'l Airport Centers, L.L.C. v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006) ("employee who breaches duty of loyalty terminated his agency relationship, and with it authority to access information").

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922a (article 122a of the Uniform Code of Military Justice), as added by section 1035, the following new section (article):

"§923. Art. 123. Offenses concerning Government computers

"(a) IN GENERAL.—Any person subject to this chapter who—

"(1) knowingly accesses a Government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe such information could be used to the injury of the United States, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted such information to any person not entitled to receive it;

"(2) intentionally accesses a Government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any such Government computer; or

"(3) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a Government computer;

shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'computer' has the meaning given that term in section 1030 of title 18.

"(2) The term 'Government computer' means a computer owned or operated by or on behalf of the United States Government.

"(3) The term 'damage' has the meaning given that term in section 1030 of title 18.".

9. Sectional Analysis

Section 1036 would amend Article 123 in its entirety and retitle the statute as "Offenses concerning Government computers." The new enumerated punitive article would be similar to 18 U.S.C. § 1030 (Fraud and related activity in connection with computers). Computers are used extensively throughout the armed forces, and this proposed offense would facilitate prosecuting computer-related offenses at courts-martial. The new statute would provide a UCMJ punitive article to address computer-related offenses where the gravity of the offense may make Article 92-level punishment inappropriately low, but the misconduct may not meet the criteria of existing punitive articles such as Espionage. The new offense is modeled on 18 U.S.C. § 1030, tailored to address the needs of military justice. It would apply only to persons subject to the UCMJ, and it would be directed only at U.S. government computers and U.S. government protected information.

Article 123 would not supersede or preempt the prosecution of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, Clause 3. Further, service and DoD regulations provide a broadly applicable and flexible means to prosecute less serious computer offenses under Article 92 (Failure to obey order or regulation), and the proposed offense does not supersede or preempt those regulations. Article 108 (Military property of United States—Loss, damage, destruction, or wrongful disposition) covers computer files that have been altered or damaged by the accused through deletion or destruction of computer files or programs for purposes of the offense of willfully destroying military property.

The Manual for Courts-Martial guidance for Article 123 will define and clarify terms, including the term "with an unauthorized purpose," which includes circumstances involving more than one unauthorized purpose, as well as circumstances involving an unauthorized purpose in conjunction with an authorized purpose. The guidance also will reference the UCMJ Article 1(15) definition for "classified information," and will define "protected information" to include information that has been designated as For Official Use Only (FOUO), or as Personally Identifiable Information (PII).

Article 123a – Making, Drawing, or Uttering Check, Draft, or Order Without Sufficient Funds

10 U.S.C. § 923a

1. Summary of Proposal

This Report recommends no change to Article 123a. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 123a.

2. Summary of the Current Statute

Article 123a prohibits the writing, making, drawing, or uttering of checks with the intent to defraud or deceive when the servicemember knows there are insufficient funds to cover the cost of the check.

3. Historical Background

Congress enacted Article 123a in 1961[1] to criminalize "intentional disruption of the flow and undermining the soundness of commercial paper" in courts-martial.[2] Prior to Article 123a's enactment, bad check cases were prosecuted under Articles 121 (larceny), 123 (forgery) and 134 (general article), each of which presented technical difficulties in pleading and proof.[3] Article 123a remains unchanged since its enactment.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Making, Drawing, or Uttering Check, Draft, or Order Without Sufficient Funds: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1344 (Bank fraud) sets forth a similar offense to Article 123a.

6. Recommendation and Justification

Recommendation Article 123a: No change to Article 123a.

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[1] Act of Oct. 4, 1961, Pub. L. No. 87-385 § 1(1), 75 Stat. 814, 814.

[2] *See* United States v. Woodcock, 39 M.J. 104, 106 (C.M.A. 1994) (citations omitted).

[3] *See, e.g.,* United States v. Guess, 48 M.J. 69, 71 (C.A.A.F. 1998) (reciting the legislative history and policy purpose of Article 123a) (citing S. REP. NO. 87-659 (1961), *reprinted in* 1961 U.S.C.C.A.N. 3313–15).

[4] MCM, Part IV, ¶49.e.

In view of the well-developed case law addressing Article 123a's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 124 (Current Law) – Maiming
10 U.S.C. § 924

1. Summary of Proposal

This Report recommends no change to Article 124, except to redesignate it as Article 128a as part of the realignment of the punitive articles. Part II of the Report will consider whether any changes are needed in the Manual for Courts-Martial provisions implementing the new Article 128a.

2. Summary of the Current Statute

Article 124 prohibits the intentional disfigurement, disablement, or infliction of any other serious physically debilitating injury upon another person.

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over maiming only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[1] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over maiming and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[2] The current Article 124 was derived from Article 93 of the 1948 Articles of War.[3] Since the enactment of the UCMJ in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The MCM makes clear that "maiming" does not require a specific intent to "maim," it only requires a specific intent to harm.[5] The President, under Article 56, has prescribed the

[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (photo reprint 1920) (2d ed. 1896) (discussing AW 58 of 1874 (extending jurisdiction over "common law" crimes, including maiming, in time of war) and AW 62 "the general article" of 1874).

[2] AW 93 of 1920.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 263 (1951) (explaining that while Article 124 maiming does require harm in excess of the "grievous bodily harm" standard under Article 128; it is broader than the common law offense of mayhem and encompassed a larger category of qualifying injuries).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶50.c(3); *see also* United States v. Hicks 20 C.M.R. 377 (C.M.A. 1956).

following maximum punishment(s) for the offense of Maiming: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 114 (Maiming within maritime and territorial jurisdiction) and other federal statutes[7] set forth similar offenses to Article 124.[8] There are however two primary differences between the UCMJ and Title 18 maiming offenses. First, the text of Article 124, provides broader categories of possible qualifying "maiming" injuries, whereas 18 U.S.C. § 114 is limited to a specific statutory list of injuries. Second, Article 124 only requires a specific intent to harm whereas Title 18 requires a specific intent to torture, maim, or disfigure.

6. Recommendation and Justification

Recommendation 124: No change to Article 124, except to redesignate it as Article 128a.

In view of the well-developed case law addressing Article 124's provisions, change to the statute's contents is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] MCM, Part IV, ¶50.e.

[7] *See also* 18 U.S.C. § 956 (Conspiracy to … maim….); § 1959 (Violent crimes in aid of racketeering activity); § 2332b (Acts of terrorism transcending national boundaries); § 2441 (War crimes).

[8] The MCM and 18 U.S.C. § 114 provide a similar list of injuries qualifying as maiming., e.g. "putting out a person's eye, to cut off a hand, foot, or finger, to knock out a tooth; to cut off an ear; to scar a face with acid; MCM, Part IV, ¶50.c(1); "cuts, bites, or slits the nose, ear, or lip, cuts/disables the tongue, puts out/disables an eye, cuts off/disables a limb, or pours scalding water, acid, or a corrosive substance upon another." 18 U.S.C. § 114.

Article 124a (New Location) – Bribery
10 U.S.C. § 924a

1. Summary of Proposal

This Report recommends migrating the offense of bribery currently addressed under Article 134 (the General Article)[1] to a new section, Article 124a (Bribery). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 124a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶66, the offense requires a showing that the accused wrongfully asked, offered, received, promised, or gave a thing of value to a certain person who occupied an official position or had official duties, with the intent to influence the decision or actions, or be influenced in a decision or action in an official matter in which the United States was interested. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized bribery via the General Article since the 1775 Articles of War.[2] Under the UCMJ, the President has designated bribery (in conjunction with graft) as an Article 134 offense since the 1951 MCM.[3] The current military bribery offense was derived from what was then 18 U.S.C. § 202 (now 18 U.SC. § 201) (Bribery of Public Officials and Witnesses).[4] The offenses were designed to target public corruption by military members abusing their official position for personal financial gain.[5]

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[1] MCM, Part IV, ¶66.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 716-17 n.46 (photo reprint 1920) (2d ed. 1896) (listing bribery as a form of "Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads" punishable under the General Article) (citations omitted).

[3] MCM 1951, App. 6c, ¶¶127, 128.

[4] *See* United States v. Standley, 6 C.M.R. 610, 612 (C.M.A. 1952).

[5] *See* United States v. Alexander, 12 C.M.R. 102, 105 (C.M.A. 1953).

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Bribery: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 201 (Bribery of public officials and witnesses) sets forth a similar offense to the military offense of Bribery in Article 134.

6. Recommendation and Justification

Recommendation 132: Migrate the offense of bribery currently addressed under Article 134 (the General Article (MCM, Part IV, ¶66)) to Article 124a Bribery.

Migrating the offense of bribery to the new Article 124a aligns the offense with the relocated fraud and graft offenses under the UCMJ. Bribery is a well recognized concept in criminal law. Accordingly, this offense does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

This Report also recommends no change to the existing Article 132 (Frauds against the United States), except to redesignate it as Article 124.

8. Legislative Proposal

SEC. 1037. BRIBERY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924 (article 124 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(14), the following new section (article):

[6] MCM, Part IV, ¶68.e(1).

"§924a. Art. 124a. Bribery

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value with the intent to have the person's decision or action influenced with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, with the intent to influence the decision or action of the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1037 would create a new section, Article 124a (Bribery), and would migrate the offense of bribery from Article 134 (the General article) to the new statute. Migrating the offense of bribery to the new Article 124a aligns the offense with the relocated fraud and graft offenses under the UCMJ. Bribery is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 124b (New Location) – Graft
10 U.S.C. § 924b

1. Summary of Proposal

This Report recommends migrating the offenses of graft currently addressed under Article 134 (the General Article)[1] to Article 124b (Graft). Part II of the Report will address the Manual provisions implementing the new Article 124b.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶66, the offense requires a showing that the accused wrongfully asked, accepted, or received a thing of value in an official matter when no compensation was due. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized graft via the General Article since the 1775 Articles of War.[2] Under the UCMJ, the President has designated graft (in conjunction with bribery) as an Article 134 offense since the 1951 MCM.[3] The current military graft offense was derived from what was then 18 U.S.C. § 202 (now 18 U.SC. § 201) (Bribery of Public Officials and Witnesses).[4] The offense was designed to target public corruption by military members abusing their official position for personal financial gain.[5]

4. Contemporary Practice

Bribery and Graft are both currently listed as a combined offense under Article 134 (MCM, Part IV, ¶66). The primary distinction between the two offenses is that "bribery" requires

[1] MCM, Part IV, ¶66.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 716-17 n.46 (photo reprint 1920) (2d ed. 1896) (listing bribery as a form of "Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads" punishable under the General Article) (citations omitted).

[3] MCM 1951, App. 6c, ¶¶127, 128.

[4] *See* United States v. Standley, 6 C.M.R. 610, 612 (C.M.A. 1952).

[5] *See* United States v. Alexander, 12 C.M.R. 102, 105 (C.M.A. 1953).

an intent to be influenced as an essential element, whereas "graft" does not.[6] Accordingly, graft is a lesser included offense of bribery.[7]

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Frauds against the United States: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[8]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 201 (Bribery of public officials and witnesses) sets forth a similar offense to the military offense of Bribery in Article 134.

6. Recommendation and Justification

Recommendation 132: Migrate the offense of graft currently addressed under Article 134 (the General Article (MCM, Part IV, ¶66)) to Article 124b Graft.

Migrating the offense of graft to the new Article 124b aligns the offense with the relocated fraud and bribery offenses under the UCMJ. Graft is a well recognized concept in criminal law. Accordingly, this offense does not rely upon the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports the MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

The proposed amendments would align similar offenses under Article 124 and Article 124a.

8. Legislative Proposal

SEC. 1038. GRAFT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924a (article 124a of the Uniform Code of Military Justice), as added by section 1037, the following new section (article):

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[6] MCM, para.

[7] United States v. McCrimmon, 60 M.J. 145, 151 (C.A.A.F. 2004) (upholding conviction for drill instructor accepting money from three trainees in exchange for protecting them from imposition of nonjudicial punishment).

[8] MCM, Part IV, ¶66.e(2).

"§924b. Art. 124b. Graft

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value as compensation for or in recognition of services rendered or to be rendered by the person with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, as compensation for or in recognition of services rendered or to be rendered by the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1038 would create a new section, Article 124b (Graft), and would migrate the offense of graft from Article 134 (the General article) to the new statute. Migrating the offense of graft to the new Article 124b aligns the offense with the relocated fraud and bribery offenses under the UCMJ. Graft is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[9]

[9] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 125 (Current Law) – Sodomy
10 U.S.C. §925

1. Summary of Proposal

This Report proposes to address the offense of forcible sodomy under Article 120 (Rape and sexual assault generally), and to address the sexual abuse of an animal, along with other types of animal abuse, under a new Article 134 offense. Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 125 prohibits forcible, non-consensual oral sex or anal sex between two persons, and it prohibits all sexual activity between humans and animals.

3. Historical Background

The current Article 125 was derived from Article 93 of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy.[1] The statute was amended in 2013 to eliminate the offense of consensual sodomy, while retaining the provisions addressing forcible sodomy and bestiality.[2]

4. Contemporary Practice

Currently, the same sexual acts of non-consensual oral or anal sex that may be charged under Article 125 (Sodomy) can also be charged under Article 120 (Rape and Sexual Assault Generally).[3]

There is currently no comprehensive animal abuse offense in the UCMJ; sexual acts with animals may be prosecuted under the current Article 125, and offenses committed against government-owned animals, such as military working dogs, may be prosecuted under

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[1] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[2] NDAA FY 2014, Pub. L. No. 113-66, Div. A, Title XVII, § 1707(a), 127 Stat. 672, 961 (2013).

[3] *Compare* MCM, Part IV, ¶51.c (defining sodomy as a person "tak[ing] into that person's mouth or anus the sexual organ of another person") *with* Article 120(g)(1) (defining sexual act to include, *inter alia*, "contact between the penis and the . . . anus or mouth . . . contact involving the penis occurs upon penetration, however slight"). Under current law, the defense of reasonable mistake of fact as to age is defense is available to the accused in a prosecution under Article 120 for sexual offenses involving a minor, but is not available to an the accused in a prosecution under Article 125. *See* United States v. Wilson, 66 M.J. 39, 47 (C.A.A.F. 2008).

Article 134 (para. 61)-Abusing a Public Animal. In 2012, the Joint Services Committee proposed an animal abuse offense under Article 134.[4]

5. Relationship to Federal Civilian Practice

Article 125 has no direct federal civilian counterpart. Instead, the Title 18 sexual assault statute, 18 U.S.C. § 2241 (Aggravated sexual abuse), addresses a broad spectrum of sexual acts, encompassing sexual acts defined as sodomy in Article 125.

6. Recommendation and Justification

Recommendation 125: Address the offense of forcible sodomy under Article 120 (Rape and sexual assault generally), and address the sexual abuse of an animal under a new comprehensive animal abuse offense in Article 134.

A new animal cruelty offense under Article 134 would cover the misconduct currently addressed under Articles 125 and 134, and also would address other forms of animal abuse. Article 125 would serve as the location for the offense of kidnapping which would be migrated from Article 134 as set forth in the following section of this Report.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

[4] 77 Fed. Reg. 205, 64865 (Oct. 23, 2012).

Article 125 (New Location) – Kidnapping
10 U.S.C. §925

1. Summary of Proposal

This proposal would migrate the offense of kidnapping currently addressed under Article 134 (the General Article)[1] to the new Article 125 (Kidnapping) as part of the realignment of the punitive articles. Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶92, the offense of kidnapping requires a showing that the accused seized, inveigled, decoyed, or carried away a person and then held them against their will. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated the offense of kidnapping under Article 134 in the 1984 MCM.[2] The intent of the offense's designation in Article 134 was to "end prosecutions under assimilated state law, put to a rest uncertainty concerning kidnapping offenses, and ensure the uniform treatment of the offense regardless of location."[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Kidnapping: dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1201 (Kidnapping) sets forth a similar offense to the offense of kidnapping under Article 134.

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[1] MCM, Part IV, ¶92.

[2] MCM 1984, Part IV, ¶92.

[3] MCM 1984, App. 23 (Analysis of the Punitive Articles), ¶92 at A23-21.

[4] MCM, Part IV, ¶92.e.

6. Recommendation and Justification

Recommendation 134-92: Migrate the offense of kidnapping in Article 134 (MCM, Part IV, ¶92) to the amended Article 125.

The offense of kidnapping is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable.

8. Legislative Proposal

SEC. 1039. KIDNAPPING

Section 925 of title 10, United States Code (article 125 of the Uniform Code of Military Justice), is amended to read as follows:

"§925. Art. 125. Kidnapping

"Any person subject to this chapter who wrongfully—

"(1) seizes, confines, inveigles, decoys, or carries away another person; and

"(2) holds the other person against that person's will;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1039 would migrate the offense of "Kidnapping" from Article 134 (the General article) to the redesignated Article 125 (Kidnapping). The offense of kidnapping is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. The removal of sodomy from Article 125 conforms the statute to the proposed treatment of the offense of forcible sodomy under Article 120 (Rape and sexual assault generally) and the proposal to provide comprehensive guidance on the treatment of animal abuse offenses, including bestiality, under Article 134.

Article 126 – Arson
10 U.S.C. § 926

1. Summary of Proposal

This proposal would migrate the offense of burning with intent to defraud currently addressed in Article 134 (the General Article)[1] to Article 126 (Arson; burning property with intent to defraud). This Report recommends no other changes to Article 126. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 126.

2. Summary of the Current Statute

Article 126 prohibits the willful and malicious burning or setting on fire of a dwelling or other structure. The article sets out two forms of aggravated arson and one form of simple arson.

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over "arson" only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over arson and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 126 was derived from Article 93 of the 1948 Articles of War.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

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[1] MCM, Part IV, ¶67. The offense of burning with intent to defraud is discussed under this report under "Article 126 – Arson – Addendum."

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 686-87, 670-71 (photo reprint 1920) (2d ed. 1896) (discussing AW 58 (extending jurisdiction over "common law" crimes, including arson, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Arson: depending on whether the structure was inhabited and its value, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 81 (Arson within maritime and territorial jurisdiction) sets forth a similar offense to Article 126.

6. Recommendation and Justification

Recommendation 126: Migrate the offense of burning with intent to defraud (currently in Article 134, the General Article, MCM, Part IV, ¶67), to Article 126.

This proposal would align similar offenses, and migrate the offense of Burning with Intent to Defraud from Article 134 to an enumerated punitive article, where the terminal element under Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) is not necessary to demonstrate criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

8. Legislative Proposal

SEC. 1040. ARSON; BURNING PROPERTY WITH INTENT TO DEFRAUD.

Section 926 of title 10, United States Code (article 126 of the Uniform Code of Military Justice), is amended to read as follows:

"§926. Art. 126. Arson; burning property with intent to defraud

"(a) AGGRAVATED ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein, to the knowledge of that person, there is at the

[6] MCM, Part IV, ¶52.e.

time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

"(b) SIMPLE ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets fire to the property of another is guilty of simple arson and shall be punished as a court-martial may direct.

"(c) BURNING PROPERTY WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, willfully, maliciously, and with intent to defraud, burns or sets fire to any property shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1040 would migrate the offense of "Burning with intent to defraud" from Article 134 (the General article) to redesignated Article 126 (Arson; burning property with intent to defraud). Article 126 currently prohibits the willful and malicious burning or setting on fire of a dwelling or other structure. Article 126 sets out two forms of aggravated arson and one form of simple arson. The offense of burning with intent to defraud is similar to those offenses and is itself a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[7]

[7] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 126 – Arson – Addendum
(Burning with Intent to Defraud)

1. Summary of Proposal

This proposal would migrate the offense of burning with intent to defraud currently addressed under Article 134 (the General Article)[1] to Article 126. Article 126 would be retitled as "Arson; burning property with intent to defraud." Part II of this Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. MCM, Part IV, ¶67 requires a showing that the accused willfully and maliciously burned or set fire to the property of a certain person with the intent to defraud a certain person or organization. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The Court of Military Appeals first recognized the burning of an uninhabited building with the intent to defraud as qualifying misconduct under Article 134 in 1958.[2] The President then designated "burning with intent to defraud" as an Article 134 offense in the 1968 MCM.[3]

4. Contemporary Practice

Burning with the intent to defraud is a form of aggravated arson that falls outside of the current scope of Article 126 because it does not involve the burning of an inhabited dwelling or other structure. In practical terms, the offense is intended to criminalize burning property with intent to defraud an insurance provider.[4]

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[1] MCM, Part IV, ¶67.

[2] United States v. Fuller, 25 C.M.R. 405, 406-07 (C.M.A. 1958) (holding that the willful and intentional burning of the property of another, in agreement with the owners, in order to defraud an insurance company as "service discrediting conduct" in violation of Article 134).

[3] MCM 1968, App. 6c, ¶133.

[4] *See* DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.10[3][b][ii] at 749 (2d ed. 2012).

The President, under Article 56, has prescribed the following maximum punishment for the offense of Burning with Intent to Defraud: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[5]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 81 (Arson within maritime and territorial jurisdiction) sets forth a similar offense to the offense of burning with intent to defraud in Article 134.

6. Recommendation and Justification

Recommendation 134-67: Migrate the offense of burning with intent to defraud in Article 134 (MCM, Part IV, ¶67) to Article 126.

Migrating the offense of burning with intent to defraud to Article 126 aligns the offense with the existing UCMJ arson offense. Burning with the intent to defraud is an aggravated form of arson well recognized in criminal law. Accordingly, it does not rely upon the "terminal element" of Article 134 as the basis for its criminality.[6]

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 126 (Arson), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 126 (Arson), *supra*, at paragraph 9.

[5] MCM, Part IV, ¶67.e.

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 127 – Extortion
10 U.S.C. § 927

1. Summary of Proposal

This Report recommends no change to Article 127. Part II of the Report will consider whether any changes are needed to the provisions in the Manual for Courts-Martial provisions implementing Article 127.

2. Summary of the Current Statute

Article 127 prohibits the communication of threats to another person with the intention to obtain anything of value.

3. Historical Background

Prior to enactment of the UCMJ, courts-martial exercised jurisdiction over "extortion" only when the offense occurred under circumstances which were "prejudicial to good order and discipline" in violation of the "general article."[1] The current Article 127 was derived from practice under Article 96 of the 1948 Articles of War.[2] Since the enactment of the UCMJ in 1950,[3] the statute has remained unchanged.

4. Contemporary Practice

Military courts broadly construe the word "threats" when interpreting Article 127.[4] The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Extortion: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[5]

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[1] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 716-17 n.46 (photo reprint 1920) (2d ed. 1896) (listing extortion as a species of misconduct punishable under the "General Article") (discussing AW 62 "the general article" of 1874).

[2] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] *See, e.g.,* United States v. Farkas, 21 M.J. 458, 461 (C.M.A. 1986) (holding that appellant's threat to sell victim's diamond ring qualified as a sufficient threat to "injure person, property, or reputation of another" to state offense of extortion). *See also* United States v. Brown, 67 M.J. 147, 149 (C.A.A.F. 2009) (threat to disclose prior sexual relationship with the victim in a manner which would adversely impact her military career, unless she agreed to sexual advances constituted a "threat" to obtain a "thing of value" within the meaning of the statute).

[5] MCM, Part IV, ¶53.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 871 et seq. (Extortion and threats) set forth similar offenses to Article 127.

6. Recommendation and Justification

Recommendation 127: No change to Article 127.

In view of the well-developed case law addressing Article 127's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

This Report proposes that Communicating a Threat, previously addressed in MCM Part IV, ¶110, will be included under Article 115.

Article 128 – Assault
10 U.S.C. § 928

1. Summary of Proposal

This proposal would amend Article 128 to adopt the aggravated assault provision of 18 U.S.C. § 113. This proposal would further migrate into Article 128 the general offense of assault with intent to commit certain specified offenses currently addressed under Article 134 (the General Article).[1] Part II of the Report will address changes in the Manual provisions implementing Article 128 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 128 prohibits assaults (offers or attempts to do bodily harm to another person), batteries (harmful or offensive touching of another person), and aggravated assaults (using a weapon or other means or force likely to produce grievous bodily harm, or when grievous bodily harm has been intentionally inflicted with or without a weapon).

3. Historical Background

"Assaults" (including simple assault, battery, and aggravated assault) have their origins in the common law, and have been proscribed under military law since the 1775 Articles of War.[2] The current Article 128 was derived from Article 93 of the 1948 Articles of War.[3] Since the enactment of the UCMJ in 1950,[4] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Assaults: dishonorable discharge, forfeiture of all pay and allowances, and depending on the nature of the assault, confinement for up to 10 years.[5]

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[1] MCM, Part IV, ¶64. The offense assault with intent to commit murder, etc., is discussed in the Report under "Article 128 – Assaults – Addendum." The "specified offenses" under that provision include voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking.

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 663, 666-67, 671, 687, 724 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1233-34 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 284-87 (1951) (discussing the incorporation of common law definitions of assault and battery into Article 128).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] MCM, Part IV, ¶54.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction) sets forth a similar offense to Article 128. 18 U.S.C. § 113(a)(3), the aggravated assault provision in the offense, differs from Article 128(b)(1)'s aggravated assault provision; Article 128(b)(1) is narrower, because it requires that any dangerous weapon or other instrumentality be used in a manner "likely to produce death or grievous bodily harm."[6] 18 U.S.C. § 113 requires only that an accused use "a dangerous weapon with the intent to do bodily harm"; the statute focuses on the nature of the weapon and the accused's intent rather than the "likelihood of harm." Under federal case law, a "dangerous weapon" is "an instrument capable of inflicting death or serious bodily injury."[7]

Finally, while Article 128 recognizes two categories of harm: (1) bodily harm; and (2) grievous bodily harm; 18 U.S.C. § 113 recognizes these plus a third: "substantial bodily harm." It provides a middle tier of harm under the statute and is defined as a "temporary but substantial disfigurement; or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty."[8]

6. Recommendation and Justification

Recommendation 128: Amend Article 128 to conform to 18 U.S.C. 113(a)(3) and migrate the general offense of assault in Article 134 (MCM, Part IV, ¶64) to Article 128.

This proposal improves Article 128 in three respects: (1) adopting the 18 U.S.C. § 113(a)(3) definition of aggravated assault provides clarity for "aggravated assault" and better accountability for malicious intent by focusing more on the intent of the accused rather than the "likelihood of harm";

(2) Adopting the 18 U.S.C. § 113(b)(1) "middle tier" of harm: "substantial bodily injury," into Article 128 aligns military law with federal practice and will better calibrate courts-martial punishments relative to the amount of harm caused;

(3) Removing Article 128(b)(1)'s higher "specific intent" threshold for aggravated assault (*i.e.* requiring specific intent to inflict grievous bodily harm) and adopting 18 U.S.C. §113's more modest "intent to cause bodily harm" standard will permit offenders to be held accountable for aggravated assault to the same extent under federal and military law.

[6] United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998).

[7] United States v. Sturgis, 48 F.3d 784, 787 (4th Cir. 1995) (holding that defendant's teeth were a "deadly weapon").

[8] 18 U.S.C. § 113(b)(1).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to assault in federal civilian practice insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1041. ASSAULT.

Section 928 of title 10, United States Code (article 128 of the Uniform Code of Military Justice), is amended to read as follows:

"§928. Art. 128. Assault

"(a) ASSAULT.—Any person subject to this chapter who, unlawfully and with force or violence—

"(1) attempts to do bodily harm to another person;

"(2) offers to do bodily harm to another person; or

"(3) does bodily harm to another person;

is guilty of assault and shall be punished as a court-martial may direct.

"(b) AGGRAVATED ASSAULT.—Any person subject to this chapter—

"(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or

"(2) who, in committing an assault, inflicts substantial bodily harm, or grievous bodily harm on another person;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

"(c) ASSAULT WITH INTENT TO COMMIT SPECIFIED OFFENSES.—

"(1) IN GENERAL.—Any person subject to this chapter who commits assault with intent to commit an offense specified in paragraph (2) shall be punished as a court-martial may direct.

"(2) OFFENSES SPECIFIED.—The offenses referred to in paragraph (1) are murder, voluntary manslaughter, rape, sexual assault, rape of a child, sexual assault of a child, robbery, arson, burglary, and kidnapping.".

9. Sectional Analysis

Section 1041 would amend Article 128 (Assault) to employ a standard that focuses attention on the malicious intent of the accused rather than the speculative "likelihood" of the activity actually resulting in harm, consistent with federal civilian practice.

This section also would migrate the offense of "Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking" from Article 134 (the General article) to Article 128. The offense of assault with intent to commit a serious felony is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[9]

[9] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 128 – Assault – Addendum
(Assault – with Intent to Commit Murder, Voluntary Manslaughter, Rape, Robbery, Sodomy, Arson, Burglary, or Housebreaking)

1. Summary of Proposal

This proposal would migrate the offenses of assault with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking offense currently addressed under Article 134 (the General Article),[1] with slight modifications to the qualifying list of offenses, into Article 128 (Assault). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶64, the offense of assault with intent to commit a specified offense requires a showing that the accused committed an assault upon another person with the intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law and court-martial practice has criminalized assault with intent to commit murder and other offenses via the General Article since the 1775 Articles of War.[2] Under the UCMJ, the President has designated assault with attempt to commit specified crimes as an Article 134 offense since the 1951 MCM.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of Assault with the Intent to Commit [a specified offense]: dishonorable

[1] MCM, Part IV, ¶64.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 723 (photo reprint 1920) (2d ed. 1896).

[3] MCM 1951, ¶213d.

discharge, forfeiture of all pay and allowances, and, depending on the underlying felony intended during the assault, confinement for up to 20 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 113(a)(1)(2) (Assault within maritime and territorial jurisdiction) sets forth a similar offense to the assault offense in Article 134. It differs in that it encompasses assault with intent to commit any felony.

6. Recommendation and Justification

Recommendation 134-64: Migrate the offense of assault with intent to commit an enumerated felony defined in Art. 134, the General Article (MCM, Part IV, ¶64) to Art. 128.

This series of offenses currently listed in MCM, Part IV, ¶64 are aggravated forms of assault already embraced by Article 128. Migrating this series of "assault with intent to commit" offenses to Article 128 also aligns Article 128 with federal practice under 18 U.S.C. § 113(a)(1), (2).

The list of qualifying offenses under MCM, Part IV, ¶64 should be updated to include the current Article 120b (Rape and Sexual Assault of a Child) and Kidnapping (current MCM, Part IV, ¶83). These offenses are sufficiently serious to warrant placement within the current list of qualifying offenses. Consistent with the MJRG's other realignment recommendations, "sodomy" and "housebreaking" should be deleted from the list as they are subsumed within "rape" and "burglary."

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable in federal civilian practice insofar as practicable.

8. Legislative Proposal

See Article 128 (Assault), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 128 (Assault), *supra*, at paragraph 9.

[4] MCM, Part IV, ¶64.e.

Article 129 – Burglary
10 U.S.C. § 929

1. Summary of Proposal

This proposal would amend Article 129 (Burglary) by removing the obsolete common law elements that the breaking and entering occur: (1) at a private dwelling; and (2) at nighttime. This proposal would also migrate the housebreaking provisions under Article 130 and the offense of unlawful entry under Article 134 (the General Article) into Article 129.[1] Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 129 necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 129 prohibits the breaking and entering of a dwelling house of another during the nighttime with the specific intent to commit any offense punishable under Article 118-128 (excluding Article 123a (Making/Drawing/Uttering Checks without sufficient funds).

3. Historical Background

Until 1920, courts-martial exercised jurisdiction over burglary only when the offense occurred either in wartime or under circumstances which were "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over burglary and a list of other common law offenses, without requiring proof of prejudice to good order and discipline.[3] The current Article 129 was derived from Article 93 of the 1948 Articles of War.[4] Since the enactment of the UCMJ in 1950,[5] the statute has remained unchanged.

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[1] MCM, Part IV, ¶111. The offense of housebreaking is discussed in this Report under "Article 129 – Burglary – Addendum."

[2] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71, 682 (photo reprint 1920) (2d ed. 1896) (discussing AW 58 (extending jurisdiction over "common law" crimes, including arson, in time of war) and AW 62 "the general article" of 1874).

[3] AW 93 of 1920.

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949); *see also* LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES 287 (1951) (noting that Article 129 "includes all the common law elements").

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Burglary: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2117 (Breaking or entering of carrier facilities) and 18 U.S.C. § 2118 (Robberies and burglaries involving controlled substances) set forth similar offenses to Article 129. Neither 18 U.S.C. § 2117 nor § 2118 require a "breaking and entering" at nighttime; and they do not require that it be in the personal dwelling of another.

The modern trend, reflected in federal law and the Model Penal Code,[7] and followed by the majority of states is to use the factors of a "personal dwelling" and/or "nighttime" as aggravating factors for punishment purposes only, not as elements of burglary.[8]

6. Recommendation and Justification

Recommendation 129: Amend Article 129 by removing the "private dwelling" and "nighttime" elements, and migrate the provisions under Article 130 and the offense of unlawful entry in Article 134 (MCM, Part IV, ¶111) to Article 129.

Modernizing and consolidating Article 129 Burglary with housebreaking and unlawful entry aligns the UCMJ with federal and state practice and enables natural alignment of statutory lesser included offenses. There is no unique military reason to deviate from federal and state practice and require all burglaries to take place "at night" and in a "personal dwelling" as a statutory prerequisite rather than as a punishment enhancer.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to burglary in the civilian sector insofar as practicable in military criminal practice.

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[6] MCM, Part IV, ¶55.e.

[7] Model Penal Code § 221.1 (1981): "A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with the purpose to commit a crime therein . . ."

[8] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, VOL. 3, § 21.1(a) (2d ed. 2003) ("Across the intervening centuries these elements [of common law burglary] have been expanded or discarded to such an extent that modern day offense common known as burglary bears little relation to its common law ancestor."); § 21.1(c) n.87 (citations omitted) (*Personal Dwelling*: citing several state statutes using "personal dwelling" factor as only a punishment enhancer) § 21.1(d) n.102 (citations omitted) (*Nighttime*: citing several states using "nighttime" factor as a burglary punishment enhancer, not a prerequisite).

8. Legislative Proposal

SEC. 1042. BURGLARY AND UNLAWFUL ENTRY.

Section 929 of title 10, United States Code (article 129 of the Uniform Code of Military Justice), and section 929a of such title (article 129a), as redesignated by section 1001(10), are amended to read as follows:

"§929. Art. 129. Burglary; unlawful entry

"(a) BURGLARY.—Any person subject to this chapter who, with intent to commit an offense under this chapter, breaks and enters the building or structure of another shall be punished as a court-martial may direct.

"(b) UNLAWFUL ENTRY.—Any person subject to this chapter who unlawfully enters—

"(1) the real property of another; or

"(2) the personal property of another which amounts to a structure usually used for habitation or storage;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1042 would amend Article 129 and retitle the statute as "Burglary; unlawful entry." In the amended statute, the common-law "personal dwelling" and "nighttime" elements would be removed to align Article 129 with the majority rule reflected in federal and state law. As part of the realignment of closely related offenses, the offense of "Housebreaking" would be incorporated into Article 129.

The offense of "Unlawful entry" would migrate as a separate subsection from Article 134 (the General article). Illegally accessing someone else's property is a well-recognized concept in criminal law. Accordingly, the offense of unlawful entry does not need to rely

upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[9]

[9] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 129 – Burglary – Addendum
(Unlawful Entry)

1. Summary of Proposal

This proposal would migrate the offense of unlawful entry currently addressed under Article 134 (the General Article)[1] to Article 129 (Burglary; Unlawful Entry). Part II of the Report will address changes in the Manual for Courts-Martial necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶111, the offense requires a showing that the accused entered the real or personal property of another without lawful authority. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated "Unlawful Entry" as an Article 134 offense in the 1951 MCM.[2] The military offense of "unlawful" entry was based upon a 1901 provision of the District of Columbia (later amended in 1951).[3] The Court of Military Appeals first affirmed a conviction for this offense under Article 134 in 1954 in *United States v. Love*.[4]

4. Contemporary Practice

Unlawful entry is a "general intent" crime.[5] The property protected under unlawful entry is broader than that for burglary (personal dwelling) or housebreaking (property used for habitation or storage), and unlike burglary, there is no "breaking" requirement.[6]

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[1] MCM, Part IV, ¶111.

[2] MCM 1951, App. 6c, ¶174.

[3] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSON & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.59[2] at 1004 (2d ed. 2012) (citations omitted).

[4] 15 C.M.R. 260, 262 (C.M.A. 1954) (upholding unlawful entry conviction for accused entering into a billeting tent).

[5] SCHLUETER ET AL., *supra* note 3, at 1004 (citations omitted).

[6] *Id*.

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Unlawful Entry: bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.[7]

5. Relationship to Federal Civilian Practice

Title 18 does not provide a counterpart to "unlawful entry" under the UCMJ. However, state law punishes unlawful entry as criminal trespassing.

6. Recommendation and Justification

Recommendation 134-111: Migrate the offense of unlawful entry currently in Article 134, the General Article (MCM, Part IV, ¶111), to Article 129.

Migrating the unlawful entry offense aligns the offense with the other criminal trespass to property offenses under the newly reconstituted Article 129 (Burglary). Illegally accessing someone else's property is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 129 (Burglary), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 129 (Burglary), *supra*, at paragraph 9.

[7] MCM, Part IV, ¶111.e.

Article 130 (Current Law) – Housebreaking
10 U.S.C. § 930

1. Summary of Proposal

This Report recommends transferring the substance of Article 130 Housebreaking to the amended Article 129 (Burglary) as part of the revision of that offense. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 129.

2. Summary of the Current Statute

Article 130 prohibits the unlawful entry into a building or structure with the intent to commit any criminal offense therein (excluding "purely military offenses").[1] The term "housebreaking" is a misnomer; the statute does not require that it be a dwelling or a separate structure; the place entered can be a room, shop, store, apartment building, compartment of a vessel, an inhabitable trailer, a tent, or a houseboat.[2] Furthermore, no "breaking" is required, only "unlawful entry."[3]

3. Historical Background

No specific "housebreaking" offense existed under the Articles of War until 1920.[4] During this time, conduct approximating housebreaking could only be prosecuted under the "general article" of the Articles of War which required proof that the offense was "prejudicial to good order and discipline."[5] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over housebreaking and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[6]

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[1] MCM, Part IV, ¶56.c.(3).

[2] *Id.* at ¶56.c.(4).

[3] *Id.* at ¶56.b(2) (elements requires only "unlawful entry"); ¶56.c(5) (entry defined solely as location, not method "entry of any part of the body, even a finger, is sufficient") (citing ¶55.c(3)).

[4] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 682-685 (photo reprint 1920) (2d ed. 1896) (discussing burglary and referencing no lesser included offense of "housebreaking").

[5] *Id.* at 670-71 (discussing jurisdiction over "common law" crimes, under the (then) "general article," AW 62 of 1874).

[6] AW 93 of 1920.

The current Article 130 was derived from Article 93 of the 1948 Articles of War.[7] Since the enactment of the UCMJ in 1950,[8] the statute has remained unchanged.

4. Contemporary Practice

Housebreaking is a lesser included offense of burglary.[9] Like burglary, it is a specific intent crime.[10] The offense of housebreaking should be viewed on a continuum with burglary and unlawful entry. Housebreaking is the middle tier of the three offenses. There are three primary differences between burglary and housebreaking: the property protected under housebreaking is broader than that for burglary (personal dwelling); unlike burglary, there is no "breaking" requirement; and the list of qualifying crimes includes any offense under the UCMJ which is not a "purely military offense."[11]

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Housebreaking: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[12]

5. Relationship to Federal Civilian Practice

Article 130 is a unique military offense with no direct federal civilian counterpart.[13]

6. Recommendation and Justification

Recommendation 130: Migrate the substance of Article 130 Housebreaking to the amended Article 129 (Burglary).

This change would align similar offenses under Article 129.

The term "housebreaking" is a misnomer; the statute does not require that the structure entered be the dwelling place of another or that an actual "breaking" occur. Accordingly, transferring the substance of Article 130 (Housebreaking) (which is a lesser included offense of Article 129 (Burglary)) would aid in the realignment of closely related offenses.

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[7] *Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1232 (1949).

[8] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[9] United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2010).

[10] United States v. Walsh, 5 C.M.R. 793, 794 (A.F.B.R. 1952).

[11] United States v. Contreras, 69 M.J. 120, 124 (C.A.A.F. 2010) (an offense is a purely military offense only if the UCMJ limits prosecution for the offense to servicemembers).

[12] MCM, Part IV, ¶56.e.

[13] The closest Title 18 corollaries are two narrow burglary statutes targeting offices housing controlled substances (18 U.S.C. § 2118), and common carrier facilities (18 U.S.C. § 2117).

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to burglary in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

See Article 129 (Burglary), *supra*, at paragraph 8.

9. Sectional Analysis

See Article 129 (Burglary), *supra*, at paragraph 9.

Article 131 – Perjury
10 U.S.C. § 931

1. Summary of Proposal

This Report recommends no change to the Article 131. Part II of the Report will address any changes needed in the Manual for Courts-Martial provisions implementing Article 131.

2. Summary of the Current Statute

Article 131 prohibits the willful giving of false testimony or subscribing to a false statement in a judicial proceeding or in a course of justice. The testimony or statement must be made under oath or penalty of perjury as authorized by 28 U.S.C. § 1746. In the case of testimony, the oath or affirmation must be recognized or authorized by law and administered by someone having legal authority.[1]

3. Historical Background

American military law has made perjury punishable at courts-martial since the 1775 Articles of War, via prosecution under the General Article as conduct "prejudicial to good order and discipline."[2] In 1920, Congress amended the Articles of War, enacting Article of War 93 to provide jurisdiction over perjury and a list of other "common law" offenses, without requiring proof of prejudice to good order and discipline.[3] Article 131, as enacted in 1950[4], was derived from Article 93 of the 1948 Articles of War.[5] The only substantive amendment to the statute occurred in 1976,[6] which conformed Article 131 to 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

4. Contemporary Practice

Under current law, Article 131 divides perjury into two general categories; the first category is giving false testimony, while the second category is subscribing false

[1] MCM, Part IV, ¶57.c(2)(a)-(d).

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 730 (photo reprint 1920) (2d ed. 1896) (listing fraud against the government as a species of conduct prejudicial to good order and discipline frequently punished via the (then) "general article," AW 62 of 1874).

[3] AW 93 of 1920.

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[5] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1234 (1949).

[6] Act of Oct. 18, 1976, Pub.L. 94-550, § 3, 90 Stat. 2534, 2535 (1976).

statements.[7] The President, under Article 56, has prescribed the following maximum punishments for the offense of Perjury: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[8]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1621(Perjury) sets forth a nearly identical offense to Article 131.

6. Recommendation and Justification

Recommendation 131: No change to Article 131.

In view of the well-developed case law addressing Article 131's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by minimizing change when established military law is similar to the law applied in U.S. district courts.

[7] MCM, Part IV, ¶57.c(2), (3).

[8] *Id.* at ¶57.e.

Article 131a (New Provision) – Subornation of Perjury

10 U.S.C. § 931a

1. Summary of Proposal

This proposal would migrate the offense of subornation of perjury currently addressed under Article 134 (the General Article)[1] to a new Article 131a (Subornation of Perjury). Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing Article 131a.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶98, the offense requires a person to persuade someone else to commit perjury in court. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

American military law has criminalized suborning perjury as a violation of the General Article since the Articles of War of 1775.[2] Under the UCMJ, the President has designated subornation of perjury as an Article 134 offense since the 1951 MCM.[3] The offense of subornation of perjury is designed to prevent the corruption of the trial process by false testimony.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Subornation of Perjury: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5]

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[1] MCM, Part IV, ¶98.

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 702 (photo reprint 1920) (2d ed. 1896).

[3] MCM 1951, ¶213d.

[4] *See* United States v. Standifer, 40 M.J. 440, 443 (C.M.A. 1994).

[5] MCM, Part IV, ¶98.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1622 (Subornation of perjury) sets forth a similar offense to the offense of subornation of perjury in Article134.

6. Recommendation and Justification

Recommendation 134-98: Migrate the offense of subornation of perjury in Article 134 (MCM, Part IV, ¶98) to Article 131.

Migrating the offense of subornation of perjury to Article 131 aligns the offense with the other similar subject matter offenses under the UCMJ. Suborning perjury is a well recognized concept in criminal law and is inherently prejudicial to good order and discipline as it corrupts the trial process and interferes with the administration of justice. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1044. SUBORNATION OF PERJURY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931 (article 131 of the Uniform Code of Military Justice), the following new section (article):

"§931a. Art. 131a. Subornation of perjury

"(a) IN GENERAL.—Any person subject to this chapter who induces and procures another person—

"(1) to take an oath; and

"(2) to falsely testify, depose, or state upon such oath;

shall, if the conditions specified in subsection (b) are satisfied, be punished as a court-martial may direct.

"(b) CONDITIONS.—The conditions referred to in subsection (a) are the following:

"(1) The oath is administered with respect to a matter for which such oath is required or authorized by law.

"(2) The oath is administered by a person having authority to do so.

"(3) Upon the oath, the other person willfully makes or subscribes a statement.

"(4) The statement is material.

"(5) The statement is false.

"(6) When the statement is made or subscribed, the person subject to this chapter and the other person do not believe that the statement is true.".

9. Sectional Analysis

Section 1044 would create a new section, Article 131a (Subornation of perjury), and would migrate the offense of "Perjury: subornation of" from Article 134 (the General article) to the new statute. Migrating this offense would place it alongside similar offenses in the UCMJ. The offense of suborning perjury is a well-recognized concept in criminal law as it corrupts the trial process and interferes with the administration of justice. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131b (New Provision) – Obstructing Justice
10 U.S.C. § 131b

1. Summary of Proposal

This proposal would migrate the offense of obstructing justice currently addressed under Article 134 (the General Article)[1] to a new Article 131b (Obstruction of Justice). Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 131b.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶96, the offense requires a showing that the accused did a wrongful act in the case of a person subject to criminal proceedings,[2] with the intent to influence, impede or otherwise obstruct the due administration of justice. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The military offense of obstructing justice began as an undesignated Article 134 offense.[3] In 1952, the Court of Military Appeals determined that a servicemember could also be prosecuted under the first two clauses of Article 134 for obstruction or interference with the administration of military justice, independent of other federal statutes.[4] The President first designated the offense of obstruction of justice under Article 134 in the 1969 Manual for Courts-Martial.[5]

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[1] MCM, Part IV, ¶96.

[2] Under current law, "criminal proceedings" includes nonjudicial punishment and summary court-martial proceedings. *See* MCM, Part IV, ¶96c.

[3] United States v. Long, 6 C.M.R. 60, 71 (C.M.A. 1952) (affirming legality of "obstruction of justice" as violative of Article 134 clauses 1 and 2 and utilizing the federal obstruction of justice statute to determine maximum punishment for the offense).

[4] *Id*. at 65.

[5] MCM 1969, App 6(c), ¶165.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Obstructing Justice: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

MCM, Part IV, ¶96, addresses a broad spectrum of conduct analogous to, though not controlled by, offenses codified in Title 18, Chapter 73 (Obstruction of Justice) of the U.S. Code.[7]

6. Recommendation and Justification

Recommendation 134-96: Migrate the offense of obstructing justice in Article 134 (MCM, Part IV, ¶96) to the new Article 131b.

The offense of obstructing justice is well recognized in criminal law. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

As amended, Article 131b would cover conduct by an accused in the case of a person against whom the accused has reason to believe there were or would be "criminal or disciplinary proceedings pending." The addition of the word "disciplinary" is intended to clarify that the pending proceeding may include a summary court-martial proceeding, consistent with the proposal under Article 20 to clarify that the summary court-martial is a non-criminal forum.

Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 131b, including the provisions defining "criminal or disciplinary proceedings," which are intended to include non-judicial punishment and summary court-martial proceedings.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

This proposal is related to the proposed amendment to Article 20 to clarify that the summary court-martial is a non-criminal forum.

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[6] MCM, Part IV, ¶96e.

[7] *See* MCM, App 23, ¶96 (citing 18 U.S.C. §§ 1503, 1505, 1510, 1512, and 1513); *see also* United States v. Caudill, 10 M.J. 787, 789 (A.F.C.M.R. 1981) (elements of obstruction of justice under Article 134 are not controlled by the elements of similar offenses denounced by the United States Code).

8. Legislative Proposal

SEC. 1045. OBSTRUCTING JUSTICE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931a (article 131a of the Uniform Code of Military Justice), as added by section 1044, the following new section (article):

"§931b. Art. 131b. Obstructing justice

"Any person subject to this chapter who engages in conduct in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending, with intent to influence, impede, or otherwise obstruct the due administration of justice shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1045 would create a new section, Article 131b (Obstructing justice), and would migrate the offense of "Obstructing justice" from Article 134 (the General article) to the new statute. The offense of obstructing justice is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[8]

[8] For further discussion of the concept of "migration," *see* Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131c (New Provision) – Misprision of Serious Offense

10 U.S.C. § 931c

1. Summary of Proposal

This proposal would migrate the offense of misprision of serious offense currently addressed under Article 134 (the General Article)[1] to a new Article 131c (Misprision of serious offense). Part II of the Report will address the Manual for Courts-Martial provisions implementing Article 131c.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶95, the offense requires a showing that the accused knew that a particular person committed a serious offense and not only failed to report the offense to authorities, but actively aided in concealing it. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The offense of misprision of a serious offense was first designated by the President in the 1951 MCM.[2] Although it is rarely charged, the crime of misprision of a serious offense is well established in military law.[3]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Misprision of Serious Offense: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.[4]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 4 (Misprision of felony) sets forth a similar offense to the offense of misprision of serious offense in Article 134.

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[1] MCM, Part IV, ¶95.

[2] MCM 1951, ¶213d.

[3] *See* United States v. Sanchez, 47 M.J. 794, 796 (N-M. Ct. Crim. App. 1998) *aff'd*, 51 M.J. 165 (C.A.A.F. 1999); United States v. Hoff, 27 M.J. 70, 72 (C.M.A. 1988); United States v. Assey, 9 C.M.R. 732, 735 (A.F.B.R.1953).

[4] MCM, Part IV, ¶95e.

6. Recommendation and Justification

Recommendation 134-95: Migrate the offense of misprision of serious offense in Article 134 (MCM, Part IV, ¶95) to the new Article 131c.

Migrating misprision of a serious offense to its own enumerated punitive article: Article 131c, aligns the offense with similar subject matter offenses involving obstruction of justice under the UCMJ. Obstruction of justice and wrongful concealment of information from law enforcement officials is a well-recognized concept in criminal law. Accordingly, this offense does not rely upon the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1046. MISPRISION OF SERIOUS OFFENSE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931b (article 131b of the Uniform Code of Military Justice), as added by section 1045, the following new section (article):

"§931c. Art. 131c. Misprision of serious offense

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who knows that another person has committed a serious offense; and

"(2) wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1046 would create a new section, Article 131c (Misprision of serious offense), and would migrate the offense of "Misprision of serious offense" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[5]

[5] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131d (New Provision) - Wrongful Refusal to Testify

10 U.S.C. § 931d

1. Summary of Proposal

This proposal would migrate the offense of wrongful refusal to testify currently addressed under Article 134 (the General Article) to a new Article 131d (Wrongful refusal to testify). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131d.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶108, the offense of wrongful refusal to testify requires a showing that the accused refused to qualify as a witness in a court proceeding or refused to answer a certain question in the proceeding. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

The offense is a type of contempt, and is designed to punish witnesses subject to the Code who wrongfully refuse to testify. A good faith but legally mistaken belief in the right to remain silent is not a defense to a charge of wrongful refusal to testify.[1]

3. Historical Background

The President designated the offense of wrongful refusal to testify under Art. 134 in 1951.[2]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Wrongful Refusal to Testify: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[3]

5. Relationship to Federal Civilian Practice

28 U.S.C. § 1826 (Recalcitrant Witnesses) sets forth a similar offense to the offense of wrongful refusal to testify in Article 134.

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[1] MCM, Part IV, ¶108.c.

[2] MCM 1951, App. 6c, ¶164.

[3] MCM, Part IV, ¶108.e.

6. Recommendation and Justification

Recommendation 134-108: Migrate the offense of wrongful refusal to testify in Article 134 (MCM, Part IV, ¶108) as Article 131d.

The offense of wrongfully refusing to testify addresses conduct that is a well recognized concept in criminal law. Accordingly, this offense does not rely upon additional proof of the terminal element of Art. 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable in federal civilian practice insofar as practicable.

8. Legislative Proposal

SEC. 1047. WRONGFUL REFUSAL TO TESTIFY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931c (article 131c of the Uniform Code of Military Justice), as added by section 1046, the following new section (article):

"§931d. Art. 131d. Wrongful refusal to testify

"Any person subject to this chapter who, in the presence of a court-martial, a board of officers, a military commission, a court of inquiry, preliminary hearing, or an officer taking a deposition, of or for the United States, wrongfully refuses to qualify as a witness or to answer a question after having been directed to do so by the person presiding shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1047 would create a new section, Article 131d (Wrongful refusal to testify), and would migrate the offense of "Testify: wrongful refusal" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Article 131e (New Provision) – Prevention of Authorized Seizure of Property

10 U.S.C. § 931e

1. Summary of Proposal

This proposal would migrate the offense of destruction, removal, or disposal of property to prevent seizure, currently addressed under Article 134 (the General Article),[1] to the new Article 131e (Prevention of authorized seizure of property). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131e.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. Under MCM, Part IV, ¶103, the offense requires a showing that an accused, knowing that authorized persons are in the process of lawfully seizing certain property, destroys, removes, or otherwise disposes of the property with intent to frustrate the seizure. Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or service discrediting.

3. Historical Background

The President first designated destruction, removal, or disposal of property to prevent seizure as an Article 134 offense in the 1984 MCM.[2] This offense is based on 18 USC § 2232 - "Destruction or removal of property to prevent seizure."[3] Prior to 1984, destruction or removal of property to prevent seizure was charged by assimilating the federal statute under Clause 3 of Article 134.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Destruction, Removal, or Disposal of Property to Prevent Seizure: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.[5]

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[1] MCM, Part IV, ¶103.

[2] MCM 1984, Part IV, ¶103.

[3] MCM, App. 23 (Analysis of Punitive Articles), A23-26.

[4] *See, e.g.,* United States v. Fishel, 12 M.J. 602, 605 (A.C.M.R. 1981) (sustaining conviction for violation of assimilated federal statute where accused, knowing police had entered room to seize marijuana, threw it out the window).

[5] MCM, Part IV, ¶103.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2232 (Destruction or removal of property to prevent seizure) sets forth a similar offense to the offense of destruction, removal, or disposal of property to prevent seizure in Article 134.

6. Recommendation and Justification

Recommendation 134-103: Migrate the offense of destruction, removal, or disposal of property to prevent seizure in Article 134 (MCM, Part IV, ¶103) as Article 131e.

The offense of destruction, removal, or disposal of property to prevent seizure addresses conduct that is well recognized in criminal law and is inherently prejudicial to good order and discipline and of a nature to discredit the armed forces. Accordingly, this offense does not rely upon additional proof of the terminal element of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative proposal

SEC. 1048. PREVENTION OF AUTHORIZED SEIZURE OF PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931d (article 131d of the Uniform Code of Military Justice), as added by section 1047, the following new section (article):

“§931e. Art. 131e. Prevention of authorized seizure of property

“Any person subject to this chapter who, knowing that one or more persons authorized to make searches and seizures are seizing, are about to seize, or are endeavoring to seize property, destroys, removes, or otherwise disposes of the property with intent to prevent the seizure thereof shall be punished as a court-martial may direct.”.

9. Sectional Analysis

Section 1048 would create a new section, Article 131e (Prevention of authorized seizure of property), and would migrate the offense of "Seizure: destruction, removal, or disposal of property to prevent" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.[6]

[6] For further discussion of the concept of "migration," see Executive Summary, *supra*, and Article 134—General Article (10 U.S.C. § 934), *infra*.

Article 131g (New Provision) – Wrongful Interference with Adverse Administrative Proceeding

10 U.S.C. § 931g

1. Summary of Proposal

This proposal would migrate the offense of wrongful interference with an adverse administrative proceeding currently addressed under Article 134 (the General Article)[1] to a new Article 131g (Wrongful interference with an adverse administrative proceeding). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 131g.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. In MCM, Part IV, ¶96a, the offense occurs when an accused, knowing or having reason to believe there is an adverse administrative proceeding underway or pending against a certain person, commits certain wrongful acts with the intent to "influence, impede, or obstruct the conduct of such administrative proceeding, or otherwise obstruct the due administration of justice."[2] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The President first designated wrongful interference in an adverse administrative proceeding as an Article 134 offense in the 1994 MCM.[3]

4. Contemporary Practice

The wording of the offense and its interpretation is similar to the offense of obstructing justice.[4] The purpose of the offense is to extend an "obstruction of justice" protection to

[1] MCM, Part IV, ¶96a.

[2] MCM, Part IV, ¶96a.b.

[3] MCM 1994, Part IV, ¶96a.

[4] *See* United States v. DeMaro, 62 M.J. 663, 665 (C.G. Ct. Crim. App. 2006) (relying upon interpretation principles for "obstruction of justice" to construe the offense: "we draw upon cases considering nearly identical language contained within the obstruction of justice offense."), *rev. denied* 63 M.J. 470 (C.A.A.F. 2006).

administrative hearings "given the increased number of administrative actions initiated in each service."[5]

The President, under Article 56, has prescribed the following maximum punishment for the offense of Wrongful Interference with an Adverse Administrative Proceeding: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1505 (Obstruction of proceedings before departments, agencies, and committees) sets forth a similar offense to the offense of wrongful interference with an adverse administrative proceeding in Article 134.

6. Recommendation and Justification

Recommendation 134-96a: Migrate the offense of wrongful interference with an adverse administrative proceeding in Article 134 (MCM, Part IV, ¶96a) to the new Article 131g.

Migrating the offense of wrongful interference in an adverse administrative proceeding to Article 131g aligns the offense with the existing UCMJ "obstruction of justice" offenses. Wrongful interference and obstruction of official government proceedings is a well-recognized concept in criminal law. Accordingly, interference and obstruction offenses do not rely upon the "terminal element" of Article 134 as the basis for their criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to criminal law in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1049. WRONGFUL INTERFERENCE WITH ADVERSE ADMINISTRATIVE PROCEEDING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931f (article 131f of the Uniform Code of Military Justice), as

[5] *Id.* at App. 21 at A21-105.

[6] MCM, Part IV, ¶96a.e.

transferred and redesignated by section 1001(3), the following new section (article):

"§931g. Art. 131g. Wrongful interference with adverse administrative proceeding

"Any person subject to this chapter who, having reason to believe that an adverse administrative proceeding is pending against any person subject to this chapter, wrongfully acts with the intent—

"(1) to influence, impede, or obstruct the conduct of the proceeding; or

"(2) otherwise to obstruct the due administration of justice;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1049 would create a new section, Article 131g (Wrongful interference with adverse administrative proceeding), and would migrate the offense of "Wrongful interference with an adverse administrative proceeding" from Article 134 (the General article) to the new statute. The administrative proceedings addressed by this offense would include any administrative proceeding or action initiated against a servicemember that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

If, however, a servicemember wrongfully interferes with an administrative proceeding not addressed under this offense, and that interference takes place under circumstances that are prejudicial to good order and discipline or service discrediting, the new Article 131g is not intended to preempt prosecution for wrongful interference in those other administrative proceedings under clauses 1 or 2 of Article 134.

Article 132 (Current Law) – Frauds Against the United States

10 U.S.C. § 932

1. Summary of Proposal

This Report recommends no change to the existing Article 132, except to redesignate it as Article 124. Part II of the Report will address changes in the Manual for Courts-Martial provisions implementing the new Article 124.

2. Summary of the Current Statute

Article 132 prohibits making a false or fraudulent claim against the federal government.

3. Historical Background

American military law has made fraudulent claims against the federal government punishable at courts-martial since the 1775 Articles of War via prosecution under the "General Article" as conduct "prejudicial to good order and discipline."[1] In Article 60 of the 1874 Articles of War [2] and Article 94 of the 1920 Articles of War,[3] Congress enacted specific stand-alone statutes criminalizing frauds against the government. The current Article 132 was derived from Article 94 of the 1948 Articles of War and Article 14 of the 1930 Articles for the Government of the Navy.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment(s) for the offense of Frauds against the United States: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[6]

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[1] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 730 (photo reprint 1920) (2d ed. 1896) (listing perjury as a species of conduct prejudicial to good order and discipline frequently punished via the (then) "general article," AW 62 of 1874).

[2] *See id.* at 697-98, 704 (discussing AW 60 of 1874 (frauds and larcenies of government property)).

[3] MCM 1921, ¶444 (providing analysis for AW 94 of 1920); App. 1 (Articles of War) at 527-28 (providing statutory text for AW 94 of 1920).

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1234-35 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[6] MCM, Part IV, ¶58.e.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1001 (Statements or entries generally) and § 1031 (Major frauds against the United States) set forth similar offenses to Article 132.

6. Recommendation and Justification

Recommendation 132: No change to Article 132, except to redesignate it as Article 124.

The proposed amendments would align similar offenses under Article 124 and Article 124a.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 132 (New Provision) – Retaliation
10 U.S.C. § 932

1. Summary of Proposal

This proposal would create a new Article 132 (Retaliation). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 132.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. MCM, Part IV, ¶96 (Obstructing Justice) requires a showing that the accused did a wrongful act in the case of a person subject to criminal proceedings, with the intent to influence, impede or otherwise obstruct the due administration of justice. This offense addresses a broad spectrum of conduct analogous to, though not controlled by, offenses codified in Title 18, Chapter 73 (Obstruction of Justice) of the U.S. Code.[1] Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The military offense of obstructing justice began as an Article 134 clause 3 offense, assimilating the federal statute.[2] In 1952, the Court of Military Appeals determined that a servicemember also could be prosecuted under the first two clauses of Article 134 for obstruction or interference with the administration of military justice, independent of other federal statutes.[3] The President first designated the offense of obstruction of justice under Article 134 in the 1969 MCM.[4]

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Obstructing Justice: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.[5] The analysis to ¶96 in the Manual for Courts-Martial makes

[1] *See* MCM, App 23 (Analysis of Punitive Articles), ¶96, (citing 18 U.S.C. §§ 1503, 1505, 1510, 1512, 1513). *But see also* United States v. Caudill, 10 M.J. 787, 789 (A.F.C.M.R. 1981) (elements of obstruction of justice under Article 134 are not controlled by the elements of similar offenses denounced by the United States Code).

[2] United States v. Long, 6 C.M.R. 60, 71 (C.M.A. 1952).

[3] *Id*. at 65.

[4] MCM 1969, App 6(c), ¶165.

[5] MCM, Part IV, ¶95e.

specific reference to 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant).[6] Additionally, retaliatory conduct in the military that is in violation of Department of Defense and service regulations may be punished under Article 92 or as conduct prejudicial to good order and discipline under Article 134.[7]

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1501 et seq. (Obstruction of Justice) set forth similar offenses to the offense of obstructing justice in Article 134. 18 U.S.C. § 1513(e) (Retaliating against a witness, victim, or an informant) prohibits retaliation against witnesses, victims, and other persons who provide truthful information to law enforcement relating to the commission or possible commission of a federal offense.

6. Recommendation and Justification

Recommendation 132: Enact a new enumerated Article 132 (Retaliation).

The offense of retaliation is inherently prejudicial to good order and discipline and of a nature to discredit the armed forces. Accordingly, this offense does not rely upon additional proof of the "terminal element" of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to the offense of retaliation against victims and witnesses in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1050. RETALIATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931g (article 131g of the Uniform Code of Military Justice), as added by section 1049, the following new section (article):

[6] MCM, App 23, ¶96.

[7] *See* DOD DIRECTIVE 7050.06, "Military Whistleblower Protection" (July 23, 2007); AIR FORCE INSTRUCTION 36-2909; ARMY REGULATION 600-20 and ARMY DIRECTIVE 2014-20; SECNAV INSTRUCTION 5370.7D (applicable to Navy and Marine-Corps); Coast Guard Civil Rights Manual, COMDTINST M5350.4C; *see also* 10 U.S.C. § 1034.

"§932. Art. 132. Retaliation

"Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or with the intent to discourage any person from reporting a criminal offense—

"(1) wrongfully takes or threatens to take an adverse personnel action against any person; or

"(2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person;

shall be punished as a court-martial may direct.".

9. Sectional Analysis

Section 1050 would amend Article 132 in its entirety and retitle the statute as "Retaliation." This new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority. Article 132 would not preempt service regulations that specify additional types of retaliatory conduct that may be punishable at court-martial under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under other appropriate Articles, such as Article 109 (destruction of property), Article 93 (Cruelty and maltreatment), Article 128 (Assault), Article 131b (Obstructing justice), Article 130 (Stalking), or Article 134 (General article).

Article 133 – Conduct Unbecoming an Officer and a Gentleman

10 U.S.C. § 933

1. Summary of Proposal

This Report recommends no change to Article 133. Part II of the Report will address any changes needed to the Manual for Courts-Martial provisions implementing Article 133.

2. Summary of the Current Statute

Article 133 prohibits conduct unbecoming an officer and a gentleman. Article 133 is intended to punish actions or behaviors of an officer, cadet or midshipman in both their official and private capacity when they dishonor or disgrace the person as an officer and seriously compromise the officer's character as a gentleman. The term "gentleman" includes both male and female commissioned officers, cadets, and midshipmen."[1]

3. Historical Background

American military law has criminalized "conduct unbecoming an officer and a gentleman" since the 1775 Articles of War.[2] The current Article 133 was derived from Article 95 of the 1948 Articles of War.[3] Since the UCMJ was enacted in 1950,[4] Article 133 has remained unchanged. The language of the statute has been broadly written, from the 1775 Articles of War[5] up through the UCMJ, and the offense has been used to address misconduct by officers not otherwise addressed in the punitive articles.

4. Contemporary Practice

Military custom and practice identifies typical examples of conduct unbecoming an officer to include, but not limited to: dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, and cruelty to subordinates.[6] Military courts limit the broad applicability of Article 133 by enforcing due process requirements for fair notice of

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[1] MCM, Part IV, ¶59.c(1).

[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 710 (photo reprint 1920) (2d ed. 1896).

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1235 (1949).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

[5] WINTHROP, *supra* note 2, at 711-12.

[6] DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN, CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES § 7.2[2] at 693 (2nd ed. 2012); *see also* MCM, Part IV, ¶59.c(3).

misconduct applicable to Article 133. Although Article 133 applies to a broad spectrum of misconduct, the U.S. Supreme Court has determined that the offense is neither overly broad nor unconstitutionally vague under the Due Process Clause of the Fifth Amendment.[7] The President, under Article 56, has prescribed the following maximum punishment for the offense of Conduct Unbecoming an Officer and a Gentleman: dismissal, forfeiture of all pay and allowances, and confinement for the same period as that authorized by the most analogous offense, or if none is prescribed, for 1 year.[8]

5. Relationship to Federal Civilian Practice

Article 133 is a unique military offense with no direct federal civilian counterpart.

6. Recommendation and Justification

Recommendation 133: No change to Article 133.

In view of the well-developed case law addressing Article 133's provisions, a statutory change is not necessary.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[7] Parker v. Levy, 417 U.S. 733, 733 (1974).

[8] MCM, Part IV, ¶59.e. The term "gentleman" connotes failings in an officer's personal character, regardless of gender. *See, e.g.*, United States v. Newak, 25 M.J. 564, 566 (A.F.C.M.R. 1987) (affirming conviction of female officer for violating Article 133, alluding to integrity without using the term "gentleman" where accused's misconduct constituted "conduct unbecoming an officer, . . . compromised her status as an officer, . . . [and] mortally wounded the confidence and respect others have for the authority of the officer corps."). Consistent with the MJRG guiding principles, this Report does not recommend an amendment where the case law is stable. If, however, consideration is given to replacing "gentleman" with a gender-neutral term, a phrase such as "person of integrity" could provide an option.

Article 134 – General Article
10 U.S.C. § 934

1. Summary of Proposal

This proposal would amend Article 134, clause 3, to clarify that it applies "extraterritorially" so as to permit prosecution of certain federal civilian "crimes and offenses, not capital" consistent with the principle of the worldwide applicability of the UCMJ as expressed by Congress in Article 5.[1]

The Report also proposes migrating 36 of the 53 presidentially designated offenses contained in the Manual for Courts-Martial under Article 134 to the enumerated punitive articles.[2]

The Report proposes a technical change to clarify that all forms of court-martial can take cognizance of offenses under Article 134.

Part II of the Report will address the designated offenses that are not recommended for migration to a punitive article; it will also discuss whether the remaining offenses should be retained and, if so, whether they should be modified. Part II of the Report will also address changes in the Manual for Courts-Martial provisions necessitated by these statutory amendments.

2. Summary of the Current Statute

Article 134 creates three categories of offenses not specifically mentioned in an enumerated punitive article under the Code: (clause 1) all disorders and neglects prejudicial to good order and discipline; (clause 2) all conduct of a nature to bring discredit upon the armed forces; and (clause 3) certain "crimes and offenses, not capital."

Clause 1 requires proof that the accused did or failed to do a certain act, and that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces.

Clause 2 requires proof that the accused did or failed to do a certain act, and that, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

Clause 3 enables prosecution of non-capital crimes which violate federal civilian law. The phrase "crimes and offenses, not capital" includes non-capital federal offenses under Title 18, United States Code, and state law offenses occurring on the exclusive or concurrent

[1] Article 5, UCMJ ("This chapter applies in all places.").

[2] *See* Appendix—Migration of Article 134 Offenses.

federal jurisdiction enclaves, described in 18 U.S.C. § 7 (Special maritime and territorial jurisdiction of the United States defined), to the same extent permitted under 18 U.S.C. § 13 (Federal Assimilative Crimes Act).

3. Historical Background

The General Article has existed in military law since the 1775 Articles of War.[3] The current General Article, Article 134, was derived from Article 96 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.[4] Since the UCMJ was enacted in 1950,[5] the statute has remained unchanged.

Like the current version, the predecessors to Article 134 provided for "the trial and punishment of any and all military offences not expressly made cognizable by court-martial in the other more specific Articles, and thus to prevent the possibility of a failure of justice in the army."[6] The scope of misconduct punishable under Article 134 is broad, and includes conduct punishable at a court-martial which is not otherwise criminalized in civilian society. The Supreme Court explained this distinction in *Parker v. Levy,* noting that because of the factors differentiating the military from civilian society, Congress may legislate with greater breadth and flexibility in the military context.[7]

4. Contemporary Practice

Exercising the authority under Article 56 to designate maximum punishments for offenses under the Code,[8] the President currently designates offenses under clauses 1 and 2 of Article 134 and lists them in the MCM at Part IV, ¶61-113.[9] These listed offenses help provide servicemembers with notice of the scope of potential misconduct under Article 134. Furthermore, pursuant to Article 5, presidentially designated offenses under clause 1 and 2 apply in all places, *i.e.,* they have worldwide applicability.[10]

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[3] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS at 720 (photo reprint 1920) (2d ed. 1896).

[4] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1235 (1949).

[5] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

[6] WINTHROP, *supra* note 3, at 720.

[7] Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[8] *See* Loving v. United States, 517 U.S. 748, 769 (1996).

[9] *See* United States v. Jones, 68 M.J. 465, 471 ("this opinion does not—and should not be read to—question the President's ability to list examples of offenses with which one could be charged under Article 134, UCMJ."); *accord* United States v. Lingenfelter, 30 M.J. 302, 305 (C.M.A. 1990) (holding the President's designation of "elements" within the MCM function as factual "sentencing escalating elements" consistent with Article 56).

[10] MCM, Part IV, ¶ 60.e(4)(a).

Federal offenses under clause 3 (crimes and offenses not capital) are not "extra-territorial," unless the federal offenses themselves are of general applicability.[11] Otherwise, the government must charge federal crimes only indirectly by utilizing clauses 1 and 2, along with the terminal element. The main difficulty with the indirect method of charging federal civilian crimes under Article 134 is that, for most crimes committed outside the United States, the terminal element must also be alleged and proven in addition to the elements of the federal crime, while the terminal element does not have to be alleged and proven for crimes committed in the United States. This discrepancy undermines the uniform treatment of military members under the UCMJ.

5. Relationship to Federal Civilian Practice

18 U.S.C. § 3261 (Military Extraterritorial Jurisdiction Act (MEJA)) is analogous to Article 134, clause 3. The statute applies to civilians accompanying the military outside of the United States; MEJA is broader than Article 134, clause 3, because it explicitly extends extraterritorial jurisdiction to all Title 18 non-capital offenses.[12]

6. Recommendation and Justification

Recommendation 134: Amend Article 134 to provide world-wide applicability of federal offenses charged under clause 3; migrate 36 of the 53 presidentially designated offenses to enumerated punitive articles.

The terminal element under Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) is not necessary to demonstrate criminality in the context of an enumerated offense. Accordingly, this Report would migrate offenses unless there is a military-specific reason for utilizing the terminal element under Article 134.[13]

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[11] MCM, Part IV, ¶ 60.c.(4); *see also* United States v. Martinelli, 62 M.J. 52, 57 (C.A.A.F. 2005) (holding that for Article 134 clause 3 purposes legislation of Congress applies only within the territorial jurisdiction of the United States unless explicitly indicated otherwise in the statute) (citations omitted).

[12] 18 U.S.C. § 3261(a); *see* H.R. REP. No 106-778, *Judiciary Committee Report on the Military Extraterritorial Jurisdiction Act of 2000* pt. 1 at 14 (2000) (reciting "Constitutional Authority Statement" for MEJA, including Art I, § 8, clauses 10, 14, 16, and 18). Federal courts have affirmed the constitutionality of MEJA. United States v. Plummer, 221 F.3d 1298, 1304 (11th Cir. 2000) ("Congress unquestionably has the authority to enforce its laws beyond the territorial boundaries of the United States."); United States v. King, 552 F.2d 833, 850 (9th Cir. 1976) ("There is no constitutional bar to the extraterritorial application of penal laws.").

[13] The MJRG recommends not migrating offenses in which the terminal element is essential to establishing the underlying criminality of the offense in a military context. Accordingly, this Report recommends not migrating the following offenses: (1) Abusing public animal (MCM, Part IV, ¶61); (2) Adultery (MCM, Part IV, ¶62); (3) Bigamy (¶65); (4) Check, worthless, making and uttering—dishonorably failing to maintain funds) (¶68); (5) Child Pornography (¶68b); (6) Cohabitation, wrongful (¶69); (7) Debt, Dishonorably failing to pay (¶71); (8) Disloyal Statements (¶72); (9) Drunk and Disorderly (¶73); (10) Firearm, discharging—through negligence(¶80); (11) Fraternization (¶83); (12) Gambling with subordinate (¶84); (13) Negligent Homicide (¶85); (14) Indecent Language (¶89); (15) Pandering and prostitution (¶97); (16) Self Injury without intent to avoid service (¶103a); and (17) Straggling (¶107). Part II of the Report will consider whether any modifications are needed in the provisions of the Manual for Courts-Martial that address these 17 offenses.

Migrating Article 134 offenses to the enumerated punitive articles arranges similar subject matter offenses together, providing a cohesive, thematic arrangement similar to state and federal criminal codes. It also enables the alignment of "lesser included offenses" in circumstances where a current Article 134 offense would be a lesser included offense of an enumerated punitive article, but for the existence of the Article 134 terminal element.[14]

Providing extraterritorial jurisdiction for Article 134, clause 3 ("all crimes not capital") aligns jurisdiction over civilians employed by or accompanying the military and servicemembers that commit federal crimes abroad.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment, and supports MJRG Operational Guidance by employing the standards and procedures applicable to extraterritorial jurisdiction in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1051. EXTRATERRITORIAL APPLICATION OF CERTAIN OFFENSES.

Section 934 of title 10, United States Code (article 134 of the Uniform Code of Military Justice), is amended by adding at the end the following new sentence: "As used in the preceding sentence, the term 'crimes and offenses not capital' includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.".

[14] *See* United States v. Jones, 68 M.J. 465, 473 (C.A.A.F. 2010) (holding that the Article 134 terminal element is a unique element that disqualifies Article 134 offense from qualifying as a lesser included offense under the "necessarily included" requirement of Article 79, as determined by the "elements test"); United States v. Miller, 67 M.J. 385, 388–89 (C.A.A.F. 2009) (holding that the Article 134 terminal elements of "conduct prejudicial to good order and discipline" and "service discrediting" are not inherently included in every enumerated punitive article) *overruling* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994).

9. Sectional Analysis

Section 1051 would amend Article 134, the General article, to cover all non-capital federal crimes of general applicability under clause 3, regardless of where the federal crime is committed. This change would make military practice uniform throughout the world and would better align it with the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261.

Subchapter XI. Miscellaneous Provisions

Article 135 – Courts of Inquiry
10 U.S.C. § 935

1. Summary of the Proposal

This proposal would amend Article 135 to provide individuals employed by the Department of Homeland Security (the department in which the Coast Guard operates) with the same rights regarding courts of inquiry that are provided to employees of the Department of Defense. Part II of the Report will address changes in the rules implementing Article 135 required as a result of this proposal.

2. Summary of the Current Statute

Article 135 provides for a court of inquiry as an administrative fact-finding body, convened by a general court-martial convening authority, and consisting of at least three commissioned officers. It may be convened either on the initiative of the convening authority or upon request of the individual under investigation. Under Article 47, courts of inquiry have the same power as courts-martial to compel the appearance and testimony of witnesses. Article 135(c) allows courts of inquiry to designate as parties individuals who are either the subject of the investigation, or persons who have a direct interest in the subject of the investigation. These parties have the right to be present, to be represented by counsel, to cross-examine witnesses, and to present evidence; however the current statute limits such "directly interested" persons to "[a]ny person subject to this chapter or employed by the Department of Defense . . . ." Article 135(d) requires the court of inquiry to make findings of fact regarding the subject of its investigation, but prohibits the court from expressing opinions or making recommendations except as requested by the convening authority. Where otherwise admissible and as prescribed under Article 50, the transcript of a court of inquiry may be used as evidence in a court-martial, and under certain conditions the proceeding may also be used as a substitute for the preliminary hearing required under Article 32.

3. Historical Background

Article 135 was based on Articles 97 to 103 of the Articles of War and Articles 42 to 44 of the proposed Articles for the Government of the Navy.[1] At that time, an Army court of inquiry could be convened only at the request of the individual whose conduct was the subject of the investigation, while in Navy practice courts of inquiry could be convened for

[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., 1235 (1949).

any formal investigation.[2] The drafters chose to incorporate the Navy's broader power into Article 135.[3] The statute has remained unchanged since the UCMJ was enacted in 1950.[4]

4. Contemporary Practice

Courts of inquiry were originally used primarily to investigate the conduct of officers, whereas boards of investigation, where sworn testimony was not taken, were generally used in cases involving enlisted members. In current practice, however, courts of inquiry are not 'courts' as the term is commonly used; they are formal administrative investigations charged with examining and inquiring into a more significant incident or accident, especially where there is a need to designate parties, take sworn testimony, and issue subpoenas for the attendance of witnesses. The results of a court of inquiry may be a significant aid to the convening authority in determining whether additional administrative action, or potentially the referral of criminal charges to court-martial for trial, is warranted.

5. Relationship to Federal Civilian Practice

Article 135 has no direct counterpart in federal practice, although in some ways courts of inquiry function similarly to civilian grand juries—both with respect to their investigative capabilities and their utility in assisting the proper authority to determine whether to dispose of the charges by referring them to court-martial for trial.

6. Recommendation and Justification

Recommendation 135: Amend Article 135 to include the Department of Homeland Security and the Coast Guard.

This proposal would extend the Court of Inquiry protections to individuals employed by the Department of Homeland Security, as the department in which the Coast Guard operates, the same as employees of the Department of Defense, ensuring consistent application of this statute for all military services.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment and that, to the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.

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[2] *Id.*

[3] *Id.* In addition, the drafters chose to incorporate the provision in the proposed Navy Articles that allowed Department of Defense employees whose conduct may be involved in the inquiry to intervene in order to protect their rights and reputation. *See* A Bill to Amend the Articles for the Government of the Navy to Improve the Administration of Naval Justice, H.R. 3687, 80th Cong., 1st Sess. (1947) (proposed Article 42(d)) ("Any person subject to these articles, or in the employ of the naval service, who has an interest in the subject of the inquiry, shall have a right to be present and to be represented by counsel of his own choice."). This provision became the basis for Article 135(c).

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

This proposal supports MJRG Operational Guidance by addressing an inconsistency in the current Article 135 concerning Courts of Inquiry, thereby reducing the potential for unnecessary litigation.

8. Legislative Proposal

SEC. 1101. TECHNICAL AMENDMENT RELATING TO COURTS OF INQUIRY.

Section 935(c) of title 10, United States Code (article 135(c) of the Uniform Code of Military Justice), is amended—

(1) by striking "(c) Any person" and inserting "(c)(1) Any person";

(2) by designating the second and third sentences as paragraphs (2) and (3), respectively; and

(3) in paragraph (2), as so designated, by striking "subject to this chapter or employed by the Department of Defense" and inserting "who is (A) subject to this chapter, (B) employed by the Department of Defense, or (C) employed by the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, and".

9. Sectional Analysis

Section 1101 would amend Article 135 (Courts of inquiry) to provide individuals employed by the Department of Homeland Security, the department under which the Coast Guard operates, the right to be designated as parties in interest when they have a direct interest in the subject of a court of inquiry convened under Article 135. This change would align the rights of employees of the Department of Homeland Security with the rights of employees of the Department of Defense, ensuring consistent application of this statute for all military services.

Article 136 – Authority to Administer Oaths and to Act as Notary

10 U.S.C. § 936

1. Summary of Proposal

This proposal would modify the heading of Article 136 to reflect the text of the statute, with no substantive changes.

2. Summary of the Current Statute

Article 136 provides statutory authority for the administering of oaths for purposes of military administration, including military justice; and it specifies the persons and positions that may administer oaths, including "all judge advocates." The heading of the statute, but not the text, also refers to the power to act as a notary.

3. Historical Background

Article 136 was based on Article 114 of the Articles of War and Article 69 of the Articles for the Government of the Navy.[1] As originally enacted, the statute included the authority to administer oaths as well as the authority to act as a notary.[2] The statute remained unchanged until 1991, when the authority to act as a notary was transferred from Article 136 to 10 U.S.C. § 1044a.[3] The title of Article 136, however, was not amended accordingly.

4. Contemporary Practice

10 U.S.C. § 1044a (Authority to act as notary) provides general powers of a notary public to: all judge advocates, including reserve judge advocates when not in a duty status; all civilian attorneys serving as legal assistance attorneys; all adjutants, assistant adjutants, and personnel adjutants, including reserve members when not in a duty status; all other members of the armed forces, including reserve members when not in a duty status, who are designated by regulations of the armed forces or by statute to have those powers; and for the performance of notarial acts at locations outside the United States, all employees of a military department or the Coast Guard who are designated by regulations of the Secretary concerned or by statute to have those powers for exercise outside the United States.

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1236 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] NDAA FY 1991, Pub. L. No. 101-510, § 551, 104 Stat 1485 (1990).

5. Relationship to Federal Civilian Practice

Article 136 is fairly consistent with similar federal civilian standards and procedures concerning oaths. 5 U.S.C. § 2903 provides that "[a]n employee of an Executive agency designated in writing by the head of the Executive agency, or the Secretary of a military department with respect to an employee of his department, may administer . . . any other oath required by law in connection with employment in the executive branch."[4]

6. Recommendation and Justification

Recommendation 136: Amend Article 136 by removing "and to act as notary" from the section heading.

This is a technical change to conform the heading of Article 136 to the text.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by removing an inconsistency in the statutory provision concerning the authority to administer oaths and act as a notary.

8. Legislative Proposal

SEC. 1102. TECHNICAL AMENDMENT TO ARTICLE 136.

Section 936 of title 10, United States Code (article 136 of the Uniform Code of Military Justice), is amended by striking the last five words in the section heading.

9. Sectional Analysis

Section 1102 would make a technical amendment to Article 136 (Authority to administer oaths and to act as notary) to remove from the section heading the authority to act as a notary, which is not provided for in the text of the statute.

[4] 5 U.S.C. § 2903(b)(2).

Article 137 – Articles to Be Explained
10 U.S.C. § 937

1. Summary of Proposal

This proposal would amend Article 137 to require mandatory training on the UCMJ for officers, including a requirement for focused training to commanders with authority to impose non-judicial punishment or to act as convening authority on their roles and responsibilities under the UCMJ, in addition to the current training requirements under the statute for enlisted members. This proposal would further require the Secretary of Defense to maintain and update electronic versions of the UCMJ and MCM that would be readily accessible on the Internet by members of the armed forces and the public.

2. Summary of the Current Statute

Article 137 directs that enlisted members receive training on the UCMJ—specifically regarding Articles 2, 3, 7-15, 25, 27, 31, 37, 38, 55, 77-134, and 137-139—no later than fourteen days following their initial entrance into active duty or a duty status with a reserve component. Subsection (a)(2) of the statute requires that these articles be explained again to each enlisted member after the member has completed six months of active duty and when he or she reenlists; and, in the case of reserve members, after the member has completed basic training. Article 137(b) provides that the text of the UCMJ shall be made available to all military members upon their request.

3. Historical Background

Article 110 of the 1943 Articles of War required certain articles to be explained to every soldier at the time of enlistment.[1] When the UCMJ was enacted in 1950, Article 137 was based on this previous statute.[2] The drafters expressly provided that the specified articles were to be "explained"—as opposed to being read by the enlisted member—"as it [was] felt that a careful explanation is of more value than a mere readings."[3] In 1996, Congress amended the statute to provide for a fourteen-day window for the required explanation to be provided, as opposed to the previous six-day requirement. Other than this minor change, the statute has remained relatively unchanged since its enactment.[4]

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[1] AW 110 of 1943.

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1236 (1949).

[4] Aug. 10, 1956, c. 1041, 70A Stat. 78; Nov. 14, 1986, Pub. L. No. 99-661, Div. A, Title VIII, § 804(d), 100 Stat. 3907; NDAA FY 1996, Pub. L. No. 104-106, Div. A, Title XI, § 1152, 110 Stat. 468.

4. Contemporary Practice

Under current law, each of the services promulgates regulations implementing the requirements set forth in Article 137.[5] The services also incorporate military justice instruction into a variety of continuing professional education programs for officers and non-commissioned officers.

5. Relationship to Federal Civilian Practice

There is no provision directly equivalent to Article 137 in federal civilian practice.

6. Recommendation and Justification

Recommendation 137.1: Amend Article 137 to include specific UCMJ training requirements for officers, officers in command, and combatant commanders.

In its current form, Article 137 ensures that enlisted members—but not officers—are made aware of certain, important provisions of the UCMJ. The training occurs at the time of enlistment, at a point early in a member's initial service, and upon each reenlistment. This proposal would establish a similar requirement for officers.

In addition, the proposal would establish a statutory requirement for periodic training of all commanders who exercise responsibility for the imposition of non-judicial punishment or the exercise of convening authority powers. This training would be administered under regulations prescribed by each service, and by the Secretary of Defense with respect to those who exercise similar responsibilities in Joint and Combatant Commands.

This proposal takes into account the recommendation of the Response System to Adult Sexual Assault Crimes Panel (Response Systems Panel) to "ensure all officers preparing to assume senior command positions at the grade of 0-6 and above receive dedicated legal training that fully prepares them to exercise authorities assigned to them under the UCMJ."[6]

Recommendation 137.2: Amend Article 137 to require the Secretary of Defense to maintain and update an electronic version of the UCMJ and MCM for general reference by active and reserve members of the armed forces.

This proposal would require the maintenance of updated versions of the Uniform Code of Military Justice and the Manual for Courts-Martial.

[5] ARMY REG. 27-10; AIR FORCE INSTR. 51-201; MARINE CORPS 1900.16; Navy MILPERSMAN 1160-031; COAST GUARD COMMANDANT INSTRUCTION 1600.2.

[6] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 23 (June 2014) (Recommendation 38).

7. Relationship to Objectives and Related Provisions

This proposal supports the DoD General Counsel's guiding principle to consider the recommendations of the Response Systems Panel.

This proposal supports MJRG Operational Guidance by addressing an inconsistency in the current Article 137, which prescribes a UCMJ training requirement only to enlisted members, and not to officers.

This proposal is related to all other proposals in this report, to the extent that it would facilitate timely training on the impact of all of these proposals with respect to the administration of military law in the armed forces by enlisted members and officers alike.

8. Legislative Proposal

SEC. 1103. ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE TO BE EXPLAINED TO OFFICERS UPON COMMISSIONING.

Section 937 of title 10, United States Code (article 137 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking "(a)(1) The sections of this title (articles of the Uniform Code of Military Justice)" and inserting "(a) ENLISTED MEMBERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice)";

(2) by striking subsection (b); and

(3) by inserting after subsection (a) the following new subsections:

"(b) OFFICERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice) specified in paragraph (2) shall be carefully explained to each officer at the time of (or within six months after)—

"(A) the initial entrance of the officer on active duty as an officer; or

"(B) the initial commissioning of the officer in a reserve component.

"(2) This subsection applies with respect to the sections (articles) specified in subsection (a)(3) and such other sections (articles) as the Secretary concerned may prescribe by regulation.

"(c) TRAINING FOR CERTAIN OFFICERS.—Under regulations prescribed by the Secretary concerned, officers with the authority to convene courts-martial or to impose non-judicial punishment shall receive periodic training regarding the purposes and administration of this chapter. Under regulations prescribed by the Secretary of Defense, officers assigned to duty in a combatant command, who have such authority, shall receive additional specialized training regarding the purposes and administration of this chapter.

"(d) AVAILABILITY AND MAINTENANCE OF TEXT.—The text of this chapter (the Uniform Code of Military Justice) and the text of the regulations prescribed by the President under this chapter shall be—

"(1) made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination; and

"(2) maintained by the Secretary of Defense in electronic formats that are updated periodically and made available on the Internet.".

9. Sectional Analysis

Section 1103 would amend Article 137 (Articles to be explained) to require that officers, in addition to enlisted personnel, receive training on the UCMJ upon entry to service, and

periodically thereafter. The amendments would provide for specific military justice training for military commanders and convening authorities, and would require the Secretary of Defense to prescribe regulations for additional specialized training on the UCMJ for combatant commanders and commanders of combined commands. Article 137(d), as amended, would require the Secretary of Defense to maintain an electronic version of the UCMJ and Manual for Courts-Martial that would be updated periodically and made available on the Internet for review by servicemembers and the public.

Article 138 – Complaints of Wrongs
10 U.S.C. § 938

1. Summary of Proposal

This Report recommends no change to Article 138. Part II of the Report will consider whether any changes are needed in the rules implementing Article 138.

2. Narrative Summary of the Current Statute

Article 138 provides an avenue of relief for servicemembers who believe themselves wronged by their commanding officer. The statute allows such members to file a complaint of wrong seeking redress from a senior military commander. The statute requires the officer exercising general court-martial convening authority over the commanding officer who is the subject of the complaint to examine the complaint; to take proper measures to redress the wrong complained of; and to send to the Secretary concerned a statement of the complaint, as well as any proceedings had to address the complaint.

3. Historical Background

Article 138 was derived from Article 121 of the Articles of War.[1] The Navy provided a similar procedure by regulation.[2] Article 138 has remained unchanged since the UCMJ was enacted in 1950.[3]

4. Contemporary Practice

Article 138 is implemented through service regulations.[4] When military members feel they have been wronged by their commanding officer, they may also seek redress under service-specific and Department of Defense Inspectors General programs,[5] which afford whistleblower protections with respect to a servicemember's ability to communicate with the Inspector General or with Members of Congress.[6]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1236-37 (1949).

[2] *Id*.

[3] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[4] AIR FORCE INSTRUCTION 51-904 (June 30, 1994); ARMY REG. 27-10 (Oct. 3, 2011); JAGINST 5800.7F (June 26, 2012); COAST GUARD COMMANDANT INSTRUCTION M5810.1E (Apr. 13, 2011).

[5] 5 U.S.C. § 8 (1978).

[6] 10 U.S.C. § 1034.

5. Relationship to Federal Civilian Practice

Administrative procedures that are similar to Article 138 apply in the civilian sector, including inspector general programs, whistleblower protection laws, and related administrative procedures.[7]

6. Recommendation and Justification

Recommendation 138: No change to Article 138.

A statutory change is not required for this article.

Part II of the Report will consider whether any changes are needed in the rules implementing Article 138.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice that helps to counterbalance the limitation of rights available to members of the armed forces with procedures that ensure protection of those rights that are provided under military law.

[7] *See, e.g.*, Civil Service Reform Act, Prohibited Personnel Practices, 5 U.S.C. § 2302; *see also* Civil Service Reform Act, Whistleblower Protection Act, 5 U.S.C. §§ 1211-1215, 1218-1219, 1221-1222.

Article 139 – Redress of Injuries to Property
10 U.S.C. § 939

1. Summary of Proposal

This Report recommends no change to Article 139.

2. Summary of the Current Statute

Article 139 provides for the direct payment of a claim for property willfully damaged or wrongfully taken due to the riotous, violent, or disorderly conduct of military personnel.

3. Historical Background

Article 139 was derived from Article 105 of the Articles of War.[1] The statute has remained unchanged since the UCMJ was enacted in 1950.[2]

4. Contemporary Practice

Article 139 is a claims payment provision. Although payments under Article 139 may result from conduct that is separately prosecuted under the UCMJ, a determination of liability under this statute is not dependent upon referral or disposition of UCMJ charges. Article 139 is implemented through service regulation.[3] If the claim is payable, and assessed against a military member, the claim is paid from that service-member's pay. Military appellate courts have had to consider Article 139 only occasionally.[4]

5. Relationship to Federal Civilian Practice

Article 139 has no direct federal counterpart. However, federal law permits persons to file administrative claims under the Federal Torts Claims Act or the Military Claims Act for damages caused by federal employees acting within the scope of their employment.[5]

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[1] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1237 (1949).

[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[3] AIR FORCE INSTRUCTION 51-502 (Nov. 10, 2008); ARMY REG. 27-20 (Feb. 8, 2008); JAGINST 5800.7F (June 26, 2012); COAST GUARD COMMANDANT INSTRUCTION M5890.9 (Mar. 3 1993).

[4] *See, e.g.*, United States v. Henderson, 23. M.J. 860, 862 (A.C.M.R. 1987).

[5] *See* 28 U.S.C. § 2680; 10 U.S.C. § 2733.

6. Recommendation and Justification

Recommendation 139: No change to Article 139.

In view of the well-settled practice addressing Article 139's provisions, a statutory change is not needed.

7. Relationship to Objectives and Related Provisions

This recommendation supports MJRG Operational Guidance by maintaining a unique and necessary feature of military practice.

Article 140 – Delegation by the President
10 U.S.C. § 940

1. Summary of Proposal

This Report recommends no change to Article 140. Part II of the Report will consider whether any changes are needed in the rules implementing Article 140.

2. Summary of the Current Statute

Article 140 provides that the President may delegate any authority vested in him under the Code, and may also provide for the sub-delegation of any such authority.

3. Historical Background

Article 140 has remained substantially unchanged since the UCMJ was enacted in 1950.[1]

4. Contemporary Practice

The President has retained authority under Article 36 for prescribing the Manual for Courts-Martial, including the Rules for Courts-Martial and the Military Rules of Evidence. The President also has retained authority under Article 56 to specify the maximum authorized punishments for UCMJ offenses. From time to time, the President has exercised discretion under Article 140 to delegate other authorities under the Code.[2]

5. Relationship to Federal Civilian Practice

There is no equivalent to Article 140 in federal civilian practice.

6. Recommendation and Justification

Recommendation 140: No change to Article 140

In view of the well-established method of Presidential delegation of authority through Code provisions, as well as judicial decisions recognizing this practice, a statutory change is not necessary. Part II of the Report will consider whether any changes are needed in the rules implementing Article 140.

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] *See, e.g.*, R.C.M. 1108(d) (delegating the President's inherent authority to provide for suspension of court-martial sentences to the Secretary concerned); United States v. Kinney, 22 M.J. 872, 875 n.3 (A.C.M.R. 1986); United States v. Simpson, 2 M.J. 1125, 1127 (C.G.C.M.R. 1976).

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

Article 140a (New Provision) – Case Management; Data Collection and Accessibility

10 U.S.C. § 940a

1. Summary of Proposal

This proposal would promote the development and implementation of case management, data collection, and data accessibility programs for the military justice system under standards and criteria prescribed by the Secretary of Defense.

2. Summary of the Current Statute

There is currently no UCMJ provision addressing the standards and criteria for case management, data collection, or data accessibility programs.

3. Historical Background

The military justice system developed as a highly decentralized process, with the primary responsibility for administration resting with local authorities. As a result, the responsibility for preparing records, collecting data, and providing public access to military justice information has been viewed largely as a local function, with funding responsibilities vested in officials at the installation level. Practices have varied widely among the services, and within the services, in terms of developing and implementing a modernized case management and data collection system.

4. Contemporary Practice

The UCMJ currently does not require the services to collect and maintain data for the military justice system outside of the broad categories of data collected for the annual reports required by Article 146. Each service collects, manages, and makes disclosure decisions regarding court-martial case information and documents differently through service-specific systems. The services have different programs for providing information on court-martial cases through public affairs channels. Other information typically is released only upon a request that complies with the often time-consuming requirements of the Freedom of Information Act.[1]

5. Relationship to Federal Civilian Practice

Federal civilian practice currently uses an electronic service called PACER (Public Access to Court Electronic Records) for United States federal court documents. PACER is a fee-based system, with specified opportunities for waiver of fees. In the field of case management, the

[1] 5 U.S.C. § 552.

Federal district courts use the Case Management/Electronic Case Files (CM/ECF) system. This system allows courts to accept filings and provide access to filed documents online. In the field of data collection, the National Criminal Incident Center maintains a computerized index of criminal incidents, including information on criminal offenders and on property. Civilian law enforcement agencies nationwide use and update this system. Additionally, the United States Sentencing Commission and the Administrative Office of the United States Courts maintain and publish data relating to federal sentences, criminal caseloads, and categories of cases.[2] State courts employ similar systems, with the degree of modernization, centralization, and cost of access varying from state to state.

6. Recommendation and Justification

Recommendation 140a: Enact a new Article 140a requiring the development and implementation of case management, data collection, and data accessibility programs for the military justice system under standards and criteria prescribed by the Secretary of Defense.

The separate case management, data access, and data collection practices currently in use by the services makes it difficult to collect and analyze military justice data on a system-wide basis very difficult. As noted by the Response Systems Panel in its 2014 Report to Congress, ". . . the lack of uniform, offense-specific sentencing data from military courts-martial makes meaningful comparison and analysis of sentencing outcomes in military and civilian courts difficult, if not impossible."[3]

This proposal would require the development of standards in the Manual for Courts-Martial outlining the minimum data collection requirements for military justice activities and statistics from across the Department of Defense and the Coast Guard.

A baseline of similarly collected and reported data would help facilitate periodic reviews of the military justice system by the Code Committee or its successor.

This proposal would better align military justice data collection with the Uniform Federal Crime Reporting Act of 1988, the victim and witness notifications mandated under the Crime Victims Fund pursuant to 42 U.S.C. §10601, the Victim's Rights and Restitution Act of 1990, and the Brady Handgun Violence Prevention Act of 1993.

Utilizing the experience of federal and state systems, there are significant opportunities to improve the efficiency of case management and the effectiveness of systemic analysis, by levering technology and best practices in the civilian sector. Similar considerations apply to the concept of accessibility. The civilian courts have developed systems that balance public access with the need to protect privacy, sensitive financial data, and classified information. There are well-developed models in the civilian sector which can be applied in a balanced manner to provide timely access to dockets, filings, and rulings.

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[2] *See* United States Sentencing Commission website, at http://www.ussc.gov/; Administrative Office of the United States Courts website, at http://www.uscourts.gov.

[3] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 136-137 (June 2014).

To ensure timely and effective action, the proposal requires the Secretary of Defense to develop a set of standards and criteria that would form the framework for modernization.

The Services would have the capability to add service specific requirements to the baseline. The proposal would require the Secretary of Defense to develop standards and procedures within two years after enactment of the legislation, and the services would be required to implement new systems within four years after enactment of the legislation.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by incorporating the recommendations of the Response Systems Panel concerning military justice data reporting and collection.

This proposal supports MJRG Operational Guidance by adopting standards and procedures applicable to criminal justice data collection in the civilian sector insofar as practicable in military criminal practice.

The collection and analysis of that data will provide a critical foundation to the development of sentencing parameters and guidelines under Article 56, and would facilitate the periodic evaluation of the military justice called for in this report under Article 146. This proposal would enable military justice managers to better take advantage of the opportunities for efficiency created by the amendments proposed in this report.

8. Legislative Proposal

SEC. 1104. MILITARY JUSTICE CASE MANAGEMENT; DATA COLLECTION AND ACCESSIBILITY.

(a) IN GENERAL.—Subchapter XI of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§940a. Art. 140a. Case management; data collection and accessibility

"The Secretary of Defense shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

"(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

"(2) Case processing and management.

"(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

"(4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.".

(b) EFFECTIVE DATES.—(1) Not later than 2 years after the date of the enactment of this Act, the Secretary of Defense shall carry out section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a).

(2) Not later than 4 years after the date of the enactment of this Act, the standards and criteria under section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a), shall take effect.

9. Sectional Analysis

*Section 1104(*a) would create a new section, Article 140a (Case management; data collection, and accessibility), which would require the Secretary of Defense to prescribe uniform standards and criteria for case processing and management, military justice data collection, production and distribution of records of trial, and access to case information. The purpose of this section is to enhance the management of cases, the collection of data

necessary for evaluation and analysis, and to provide appropriate public access to military justice information at all stages of court-martial proceedings. At a minimum, the system developed for implementation should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level, and to actions at trial and in subsequent proceedings concerning the findings and sentences of courts-martial.

Section 1104(b) provides the timeline for implementation of Section 1104(a). In order to provide appropriate time for implementation, this section would require promulgation of standards by the Secretary of Defense not later than two years after enactment of Section 1104, with an effective date for such standards not later than four years after enactment.

Subchapter XII. Court of Appeals for the Armed Forces

Articles 141-145 – United States Court of Appeals for the Armed Forces

10 U.S.C. §§ 941-45

1. Summary of Proposal

This Report recommends no change to Articles 141-145.

2. Summary of the Current Statutes

Articles 141-145 provide the framework for the organization and administration of the United States Court of Appeals for the Armed Forces, including: (1) establishing the Court as a court of record under Article I of the Constitution; (2) governing the appointment, qualification, and removal procedures for judges on the Court; (3) defining the eligibility requirements to serve as chief judge and the terms for the chief judge, judges, and certain attorney positions; (4) authorizing the Court to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum; and (5) authorizing retirement annuities for judges and their survivors. [1]

3. Historical Background

In 1989, Congress enacted comprehensive legislation to enhance the effectiveness and stability of the Court of Military Appeals for the Armed Forces.[2] In 1994, Congress gave the Court its current designation, the United States Court of Appeals for the Armed Forces.[3]

4. Contemporary Practice

The United States Court of Appeals for the Armed Forces is an independent court under Article I of the Constitution.[4] The Court consists of five judges who are appointed by the President by and with the advice and consent of the Senate.[5]

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[1] Appellate review by the Court is addressed in this Report's discussion of Article 67.

[2] NDAA FY 1990-1991, Pub. L. No. 101-189, tit. XIII, 103 Stat. 1569-1577 (1989). A more detailed history of the Court of Appeals for the Armed Forces is contained in the discussion to Article 67 of this Report.

[3] NDAA FY 1995, Pub. L. No. 103-337, Div. A, Title IX, § 924(a)(1), Oct. 5, 1994, 108 Stat. 2831.

[4] Article 141.

[5] Article 142(a).

5. Relationship to Federal Civilian Practice

There are 12 regional United States Circuit Courts of Appeals and the Court of Appeals for the Federal Circuit, which are standing courts under Article III of the Constitution. The regional Circuit Courts of Appeals hear appeals from the district courts located within each circuit, as well as appeals from decisions of federal administrative agencies. The statutory provisions for judges appointed to the Courts of Appeals are contained in Chapter 3 of Title 28.[6] While similar in some ways to the provisions of Articles 141-145, the provisions for Article III judges reflect their lifetime appointment and, except for the Federal Circuit, the geographic boundaries of the twelve Circuit Courts of Appeal. The chief judge of a circuit serves for a seven-year term and is generally the circuit judge who is senior in commission, with additional requirements based on age and experience.[7] In the Article III Courts of Appeals, the number of judges that sit on a panel is as the court directs.[8]

6. Recommendation and Justification

Recommendations 141-145: No change to Articles 141-145.

Articles 141 through 145 primarily concern matters related to the internal organization and administration of the Court of Appeals for the Armed Forces. In view of the judicial independence of the Court, the Department of Defense, as a matter of policy, typically has deferred to the Court with respect to initiating any legislative proposal that might be necessary in the interests of judicial administration. In that context, this Report does not recommend any changes in Articles 141 through 145.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference by using the current UCMJ as a point of departure for a baseline reassessment.

[6] 28 U.S.C. § 41 *et seq.*

[7] 28 U.S.C. § 45.

[8] 28 U.S.C. § 46(a).

Article 146 – Code Committee & Article 146a (New Provision) – Annual Reports

10 U.S.C. §§ 946-46a

1. Summary of Proposal

This proposal would enhance the efficiency and effectiveness of the UCMJ by establishing a blue ribbon panel of experts to conduct a periodic evaluation of military justice practices and procedures on a regular basis. This proposal also would create a new statute, Article 146a, to retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps.

2. Summary of the Current Statute

Article 146 provides for a Code Committee, consisting of the judges of the Court of Appeals for the Armed Forces, the individual service Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and two members of the public appointed by the Secretary of Defense. The statute requires the Code Committee to meet at least once a year, to make an annual survey, and to submit an annual report to designated congressional and executive branch officials containing military justice data and any recommendations from the Committee regarding sentence uniformity, proposed amendments, or any other matter that the Committee considers appropriate.

3. Historical Background

Congress established the Code Committee under Article 67 of the UCMJ as enacted in 1950, consisting of the Judges of the Court of Military Appeals (the original title of the Court of Appeals for the Armed Forces) and the Judge Advocates General.[1] Since 1950, Congress has added two public members and the Staff Judge Advocate to the Commandant of the Marine Corps to the Committee; Congress also has added various data items for inclusion in Committee's annual reports.[2]

[1] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[2] NDAA FY 1990 and 1991, 101 Pub. L. 189, § 1301(c), 103 Stat. 1352 (1989) (restatement and revision of subchapter XI of the UCMJ applicable to the Court of Appeals for the Armed Forces, then known as the Court of Military Appeals); NDAA FY 2013, 112 Pub. L. 239, § 532, 126 Stat. 1632 (2013) (requiring Code Committee to include in its report information concerning the appellate review process, practice of counsel and military judges in certain types of cases, and information on sufficiency of resources available to capably perform military justice functions).

4. Contemporary Practice

Since the UCMJ was enacted in 1950, the Code Committee's mission and function has evolved. Today, the Committee primarily concentrates its efforts on preparing an annual report that focuses mainly on military justice data, recent developments in the law, and related matters. In recent decades the Committee has not served as a vehicle for recommending substantive amendments to the UCMJ or the Manual for Courts-Martial.[3]

From time to time, Congress has established various blue ribbon advisory groups to address specific aspects of the military justice system.[4] The Services and outside entities have also conducted reviews that are often cited by military justice practitioners.[5]

Within the executive branch, the Joint Service Committee on Military Justice exercises the primary responsibility for recommending changes to the UCMJ and the MCM.[6] The members of the Joint Service Committee and its working group all have other major responsibilities, and serve on the Joint Service Committee as a collateral duty. Neither the Code Committee nor the Joint Service Committee has the full-time staffing necessary to conduct comprehensive periodic reviews of a complex governmental process, such as the military justice system, on a regular basis. As a result, the Code Committee has focused on the collection of information required for the annual report, and the Joint Service Committee has focused on targeted issues.

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[3] The Code Committee's annual reports are available at http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm.

[4] *See, e.g.*, NDAA FY 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632 (2013) (requiring the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel and the follow-on Judicial Proceedings Since Fiscal Year 2012 Amendments Panel).

[5] *See* REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) (sponsored by the National Institute on Military Justice and Chaired by former Chief Judge of the Court of Appeals for the Armed Forces Walter T. Cox III, known as the "Cox Commission"), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf; AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY (Jan 18, 1960) (the "Powell Report"), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf.

[6] Exec. Order No. 12,473, 3 C.F.R. 1984 Comp., p. 201 (April 13, 1984) (rescinding the 1969 Manual for Courts-Martial and replacing it with the 1984 Manual, effective August 1, 1984 and requiring that "The Secretary of Defense shall cause this Manual to be reviewed annually and shall recommend to the President any appropriate amendments."). *See also* MCM, App. 26 (U.S. DEP'T OF DEF. DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (May 3, 2003)), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf. The Joint Service Committee reports to the General Counsel of the Department of Defense, and is comprised of voting members form the Judge Advocates General of the Navy, Air Force, Army and Coast Guard, and the Staff Judge Advocate of the Marine Corps. *See* The Joint Service Committee on Military Justice (JSC), *available at* http://www.jsc.defense.gov.

5. Relationship to Federal Civilian Practice

Congress has, from time to time, provided legislative authority for the Supreme Court to prescribe rules of procedure for the lower courts of the United States.[7] In 1948, Congress created the Judicial Conference, with the Chief Justice of the United States as the presiding officer.[8] Over time, the work and oversight of the rulemaking process has been delegated by the Court to committees of the Judicial Conference, the principal policy-making body of the United States Courts. The Judicial Conference is required to:

Make a comprehensive survey of the conditions of business in the courts of the United States;

Prepare plans for the assignment of judges to or from courts of appeals or district courts, where necessary;

Submit suggestions to the various courts in the interest of promoting uniformity of management procedures and the expeditious conduct of court business;

Exercise authority provided in the United States Codes for the review of circuit council conduct and disability orders filed under that chapter; and

Carry on a continuous study of the operation and effect of the general rules of practice and procedure in use within the federal courts, as prescribed by the Supreme Court pursuant to law.[9]

The advisory committees on appellate, bankruptcy, civil, criminal, and evidence rules evaluate suggestions for rules amendments in the first instance. If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment. Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee. The Standing Committee independently reviews the findings of the advisory committees and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, typically promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules.

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[7] *See* 28 U.S.C. § 2071 *et seq.* (2012).

[8] 28 U.S.C. § 331 (2012) (establishing the Judicial Conference of the United States and setting forth its duties and requirements). "The fundamental purpose of the Judicial Conference today is to make policy with regard to the administration of the U.S. Courts." *See* Judicial Conference of the United States' website, *available at* http://www.uscourts.gov/FederalCourts/JudicialConference.aspx.

[9] *Id*.

6. Recommendation and Justification

Recommendation 146.1: Establish a blue ribbon committee—the Military Justice Review Panel—composed of experts in military law and civilian criminal law, to conduct periodic reviews of the military justice system.

The proposed Military Justice Review Panel would be composed of thirteen members. Each of the following officials would select one person to serve on the Panel: the Secretary of Defense (in consultation with the Secretary of Homeland Security), the Attorney General, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. The remaining members of the Panel would be selected by the Secretary of Defense based upon the recommendations of the each of the following: the chairman and ranking minority member of the House Armed Services Committee and the Senate Armed Services Committee, the Chief Justice of the United States, and the Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Secretary of Defense would designate one member as the Chair; the Panel would have a full-time staff.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of any recent amendments to the UCMJ and Manual for Courts-Martial. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight year cycle the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

This proposal is based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice. Accordingly, the comprehensive reviews are scheduled on an eight year schedule.

This proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Recommendation 146.2: Retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps and set forth those requirements in a new statute, Article 146a.

This proposal would create a new statute, Article 146a. The proposal anticipates that the individual reports will be compiled into a single volume using the procedures currently employed to combine individual reports into a consolidated report under the present version of Article 146.

7. Relationship to Objectives and Related Provisions

Establishing a blue ribbon panel with the responsibility for periodic review of the UCMJ and MCM will enhance the potential for those responsible for military justice to fulfill their mission in a manner that adjusts to the evolution of legal and national requirements.

8. Legislative Proposal

SEC. 1201. MILITARY JUSTICE REVIEW PANEL.

Section 946 of title 10, United States Code (article 146 of the Uniform Code of Military Justice), is amended to read as follows:

"§946. Art. 146. Military Justice Review Panel

"(a) ESTABLISHMENT.—The Secretary of Defense shall establish a panel to conduct independent periodic reviews and assessments of the operation of this chapter. The panel shall be known as the 'Military Justice Review Panel', in this section referred to as the 'Panel'.

"(b) MEMBERS.—(1) The Panel shall be composed of thirteen members.

"(2) Each of the following shall select one member of the Panel:

"(A) The Secretary of Defense (in consultation with the Secretary of Homeland Security).

"(B) The Attorney General.

"(C) The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps.

"(3) The Secretary of Defense shall select the remaining members of the Panel, taking into consideration recommendations made by each of the following:

"(A) The chairman and ranking minority member of the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

"(B) The Chief Justice of the United States.

"(C) The Chief Judge of the United States Court of Appeals for the Armed Forces.

"(c) QUALIFICATIONS OF MEMBERS.—The members of the Panel shall be appointed from among private United States citizens with expertise in criminal law, as well as appropriate and diverse experience in investigation, prosecution, defense, victim representation, or adjudication with respect to courts-martial, Federal civilian courts, or State courts.

"(d) CHAIR.—The Secretary of Defense shall select the chair of the Panel from among the members.

"(e) TERM; VACANCIES.—Each member shall be appointed for a term of eight years, and no member may serve more than one term. Any vacancy shall be filled in the same manner as the original appointment.

"(f) REVIEWS AND REPORTS.—

"(1) INITIAL REVIEW OF RECENT AMENDMENTS TO UCMJ.—During fiscal year 2020, the Panel shall conduct an initial review and assessment of the implementation of the amendments made to this chapter during the preceding five years. In

conducting the initial review and assessment, the Panel may review such other aspects of the operation of this chapter as the Panel considers appropriate.

"(2) PERIODIC COMPREHENSIVE REVIEWS.—During fiscal year 2024 and every eight years thereafter, the Panel shall conduct a comprehensive review and assessment of the operation of this chapter.

"(3) PERIODIC INTERIM REVIEWS.—During fiscal year 2028 and every eight years thereafter, the Panel shall conduct an interim review and assessment of such other aspects of the operation of this chapter as the Panel considers appropriate. In addition, at the request of the Secretary of Defense, the Panel may, at any time, review and assess other specific matters relating to the operation of this chapter.

"(4) REPORTS.—Not later than December 31 of each year during which the Panel conducts a review and assessment under this subsection, the Panel shall submit a report on the results, including the Panel's findings and recommendations, through the Secretary of Defense to the Committees on Armed Services of the Senate and the House of Representatives.

"(g) HEARINGS.—The Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Panel considers appropriate to carry out its duties under this section.

"(h) INFORMATION FROM FEDERAL AGENCIES.—Upon request of the chair of the Panel, a department or agency of the Federal Government shall provide

information that the Panel considers necessary to carry out its duties under this section.

"(i) ADMINISTRATIVE MATTERS.—

"(1) MEMBERS TO SERVE WITHOUT PAY.—Members of the Panel shall serve without pay, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services for the Panel.

"(2) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the Panel.

"(j) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Panel.".

SEC. 1202. ANNUAL REPORTS.

Subchapter XII of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§946a. Art. 146a. Annual reports

"(a) COURT OF APPEALS FOR THE ARMED FORCES.—Not later than December 31 of each year, the Court of Appeals for the Armed Forces shall submit a report that, with respect to the previous fiscal year, provides information on the number and

status of pending cases and such other matters as the Court considers appropriate regarding the operation of this chapter.

"(b) SERVICE REPORTS.—Not later than December 31 of each year, the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps shall each submit a report, with respect to the preceding fiscal year, containing the following:

"(1) Data on the number and status of pending cases.

"(2) Information on the appellate review process, including—

"(A) information on compliance with processing time goals;

"(B) descriptions of the circumstances surrounding cases in which general or special court-martial convictions were (i) reversed because of command influence or denial of the right to speedy review or (ii) otherwise remitted because of loss of records of trial or other administrative deficiencies; and

"(C) an analysis of each case in which a provision of this chapter was held unconstitutional.

"(3)(A) An explanation of measures implemented by the armed force involved to ensure the ability of judge advocates—

"(i) to participate competently as trial counsel and defense counsel in cases under this chapter;

"(ii) to preside as military judges in cases under this chapter; and

"(iii) to perform the duties of Special Victims' Counsel, when so designated under section 1044e of this title.

"(B) The explanation under subparagraph (A) shall specifically identify the measures that focus on capital cases, national security cases, sexual assault cases, and proceedings of military commissions.

"(4) The independent views of each Judge Advocate General and of the Staff Judge Advocate to the Commandant of the Marine Corps as to the sufficiency of resources available within the respective armed forces, including total workforce, funding, training, and officer and enlisted grade structure, to capably perform military justice functions.

"(5) Such other matters regarding the operation of this chapter as may be appropriate.

"(c) SUBMISSION.—Each report under this section shall be submitted—

"(1) to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives; and

"(2) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Homeland Security.".

9. Sectional Analysis

Section 1201 would amend Article 146 (Code committee) and retitle the statute as "Military Justice Review Panel." The Military Justice Review Panel would replace the Code Committee. The Military Justice Review Panel would be an independent, blue ribbon panel of experts tasked to conduct a periodic evaluation of military justice practices and

procedures on a regular basis, thereby enhancing the efficiency and effectiveness of the UCMJ and the Code's implementing regulations.

The proposed Military Justice Review Panel would be composed of thirteen members. Each of the following officials would select one person to serve on the Panel: the Secretary of Defense (in consultation with the Secretary of Homeland Security), the Attorney General, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. The remaining members of the Panel would be selected by the Secretary of Defense based upon the recommendations of each of the following: the chairman and ranking minority member of the House Armed Services Committee and the Senate Armed Services Committee, the Chief Justice of the United States, and the Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Secretary of Defense would designate one member as the Chair; the Panel would have a full-time staff.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of any recent amendments to the UCMJ and Manual for Courts-Martial. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight year cycle, the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

This proposal is based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice. Accordingly, the comprehensive reviews are scheduled on an eight-year schedule.

This proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Section 1202 would create a new section, Article 146a (Annual reports), to retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps. The proposal anticipates that the individual reports will be compiled into a single volume using the procedures currently employed to combine individual reports into a consolidated report under the present version of Article 146.

Section C.
Consolidated Legislative Proposal

A Bill

To amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to improve the quality and efficiency of the military justice system, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Military Justice Act of 2015".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE IV—COURT-MARTIAL JURISDICTION

TITLE V—COMPOSITION OF COURTS-MARTIAL

TITLE VI—PRE-TRIAL PROCEDURE

TITLE VII—TRIAL PROCEDURE

TITLE I—GENERAL PROVISIONS

SEC. 101. DEFINITIONS.

(a) DEFINITION OF MILITARY JUDGE.—Paragraph (10) of section 801 of title 10, United States Code (article 1 of the Uniform Code of Military Justice), is amended to read as follows:

"(10) The term 'military judge' means a judge advocate designated under section 826(c) of this title (article 26(c)) who is detailed under section 826(a) or section 830a of this title (article 26(a) or 30a))."

(b) DEFINITION OF JUDGE ADVOCATE.—Paragraph (13) of such section (article) is amended—

(1) in subparagraph (A), by striking "the Army or the Navy" and inserting "the Army, the Navy, or the Air Force"; and

(2) in subparagraph (B), by striking "the Air Force or".

SEC. 102. CLARIFICATION OF PERSONS SUBJECT TO UCMJ WHILE ON INACTIVE-DUTY TRAINING.

Paragraph (3) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended to read as follows:

"(3)(A) While on inactive-duty training and during any of the periods specified in subparagraph (B)—

"(i) members of a reserve component; and

"(ii) members of the Army National Guard of the United States or the Air National Guard of the United States, but only when in Federal service.

"(B) The periods referred to in subparagraph (A) are the following:

"(i) Travel to and from the inactive-duty training site of the member, pursuant to orders or regulations.

"(ii) Intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations.

"(iii) Intervals between inactive-duty training on consecutive days, pursuant to orders or regulations.".

SEC. 103. STAFF JUDGE ADVOCATE DISQUALIFICATION DUE TO PRIOR INVOLVEMENT IN CASE.

Subsection (c) of section 806 of title 10, United States Code (article 6 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) No person who, with respect to a case, serves in a capacity specified in paragraph (2) may later serve as a staff judge advocate or legal officer to any reviewing or convening authority upon the same case.

"(2) The capacities referred to in paragraph (1) are, with respect to the case involved, any of the following:

"(A) Preliminary hearing officer, court member, military judge, military magistrate, or appellate judge.

"(B) Counsel who have acted in the same case or appeared in any proceeding before a military judge, military magistrate, preliminary hearing officer, or appellate court.".

SEC. 104. CONFORMING AMENDMENT RELATING TO MILITARY MAGISTRATES.

The first sentence of section 806a(a) of title 10, United States Code (article 6a(a) of the Uniform Code of Military Justice), is amended by striking "military judge" and all that follows through the end of the sentence and inserting "military appellate judge, military judge, or military magistrate to perform the duties of the position involved.".

SEC. 105. RIGHTS OF VICTIM.

(a) DESIGNATION OF REPRESENTATIVE.—Subsection (c) of section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended in the first sentence by striking "the military judge" and all that follows through the end of the sentence and inserting the following: "the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section.".

(b) RULE OF CONSTRUCTION.—Subsection (d) of such section (article) is amended—

(1) by striking "or" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).".

(c) INTERVIEW OF VICTIM.—Such section (article) is amended by adding at the end the following new subsection:

"(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable.

"(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.".

TITLE II—APPREHENSION AND RESTRAINT

SEC. 201. RESTRAINT OF PERSONS CHARGED.

Section 810 of title 10, United States Code (article 10 of the Uniform Code of Military Justice), is amended to read as follows:

"§810. Art. 10. Restraint of persons charged

"(a) IN GENERAL.—(1) Subject to paragraph (2), any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require.

"(2) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

"(b) NOTIFICATION TO ACCUSED AND RELATED PROCEDURES.—(1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken—

"(A) to inform the person of the specific offense of which the person is accused; and

"(B) to try the person or to dismiss the charges and release the person.

"(2) To facilitate compliance with paragraph (1), the President shall prescribe regulations setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if

applicable, the preliminary hearing report submitted under section 832 of this title (article 32).".

SEC. 202. MODIFICATION OF PROHIBITION OF CONFINEMENT OF ARMED FORCES MEMBERS WITH ENEMY PRISONERS AND CERTAIN OTHERS.

Section 812 of title 10, United States Code (article 12 of the Uniform Code of Military Justice), is amended to read as follows:

"§812. Art. 12. Prohibition of confinement of armed forces members with enemy prisoners and certain others

"No member of the armed forces may be placed in confinement in immediate association with—

"(1) enemy prisoners; or

"(2) other individuals—

"(A) who are detained under the law of war and are foreign nationals; and

"(B) who are not members of the armed forces.".

TITLE III—NON-JUDICIAL PUNISHMENT

SEC. 301. MODIFICATION OF CONFINEMENT AS NON-JUDICIAL PUNISHMENT.

Section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b)—

(A) in paragraph (2)(A), by striking "on bread and water or diminished rations"; and

(B) in the undesignated matter after paragraph (2), by striking "on bread and water or diminished rations" in the sentence beginning "No two or more"; and

(2) in subsection (d), by striking "on bread and water or diminished rations" in paragraphs (2) and (3).

TITLE IV—COURT-MARTIAL JURISDICTION

SEC. 401. COURTS-MARTIAL CLASSIFIED.

Section 816 of title 10, United States Code (article 16 of the Uniform Code of Military Justice), is amended to read as follows:

"§816. Art. 16. Courts-martial classified

"(a) IN GENERAL.—The three kinds of courts-martial in each of the armed forces are the following:

"(1) General courts-martial, as described in subsection (b).

"(2) Special courts-martial, as described in subsection (c).

"(3) Summary courts-martial, as described in subsection (d).

"(b) GENERAL COURTS-MARTIAL.—General courts-martial are of the following three types:

"(1) A general court-martial consisting of a military judge and eight members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(2) In a capital case, a general court-martial consisting of a military judge and the number of members determined under section 825a of this title (article 25a), subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(3) A general court-martial consisting of a military judge alone, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(c) SPECIAL COURTS-MARTIAL.—Special courts-martial are of the following two types:

"(1) A special court-martial, consisting of a military judge and four members, subject to sections 825(d)(3) and 829 of this title (articles 25(d)(3) and 29).

"(2) A special court-martial consisting of a military judge alone—

"(A) if the case is so referred by the convening authority, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation; or

"(B) if the case is referred under paragraph (1) and, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record or in writing, a court composed of a military judge alone and the military judge approves the request.

"(d) SUMMARY COURT-MARTIAL.—A summary court-martial consists of one commissioned officer.".

SEC. 402. JURISDICTION OF GENERAL COURTS-MARTIAL.

Section 818 of title 10, United States Code (article 18 of the Uniform Code of Military Justice), is amended—

(1) in subsection (b), by striking "section 816(1)(B) of this title (article 16(1)(B))" and inserting "section 816(b)(3) of this title (article 16(b)(3))"; and

(2) by striking subsection (c) and inserting the following:

"(c) Consistent with sections 819 and 820 of this title (articles 19 and 20), only general courts-martial have jurisdiction over the following offenses:

"(1) A violation of subsection (a) or (b) of section 920 of this title (article 120).

"(2) A violation of subsection (a) or (b) of section 920b of this title (article 120b).

"(3) An attempt to commit an offense specified in paragraph (1) or (2) that is punishable under section 880 of this title (article 80).".

SEC. 403. JURISDICTION OF SPECIAL COURTS-MARTIAL.

Section 819 of title 10, United States Code (article 19 of the Uniform Code of Military Justice), is amended—

(1) by striking "Subject to" in the first sentence and inserting the following:

"(a) IN GENERAL.—Subject to";

(2) by striking "A bad-conduct discharge" and all that follows through the end; and

(3) by adding after subsection (a), as designated by paragraph (1), the following new subsections:

"(b) ADDITIONAL LIMITATION.—Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)).

"(c) MILITARY MAGISTRATE.—If charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)), the military judge, with the consent of the parties, may designate a military magistrate to preside over the special court-martial.".

SEC. 404. SUMMARY COURT-MARTIAL AS NON-CRIMINAL FORUM.

Section 820 of title 10, United States Code (article 20 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a) IN GENERAL.—" before "Subject to"; and

(2) by adding at the end the following new subsection:

"(b) NON-CRIMINAL FORUM.—A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction.".

TITLE V—COMPOSITION OF COURTS-MARTIAL

SEC. 501. TECHNICAL AMENDMENT RELATING TO PERSONS AUTHORIZED TO CONVENE GENERAL COURTS-MARTIAL.

Section 822(a)(6) of title 10, United States Code (article 22(a)(6) of the Uniform Code of Military Justice), is amended by striking "in chief".

SEC. 502. WHO MAY SERVE ON COURTS-MARTIAL; DETAIL OF MEMBERS.

(a) WHO MAY SERVE ON COURTS-MARTIAL.—Subsection (c) of section 825 of title 10, United States Code (article 25 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) Any enlisted member on active duty is eligible to serve on a general or special court-martial for the trial of any other enlisted member.

"(2) Before a court-martial with a military judge and members is assembled for trial, an enlisted member who is an accused may personally request, orally on the record or in writing, that—

"(A) the membership of the court-martial be comprised entirely of officers; or

"(B) enlisted members comprise at least one-third of the membership of the court-martial, regardless of whether enlisted members have been detailed to the court-martial.

"(3) Except as provided in paragraph (4), after such a request, the accused may not be tried by a general or special court-martial if the membership of the court-martial is inconsistent with the request.

"(4) If, because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members, as the case may be, are not available to carry out paragraph (2), the trial may nevertheless be held. In that event, the convening authority shall make a detailed written statement of the reasons for nonavailability. The statement shall be appended to the record.".

(b) DETAIL OF MEMBERS.—Subsection (d) of such section (article) is amended by adding at the end the following new paragraph:

"(3) The convening authority shall detail not less than the number of members necessary to impanel the court-martial under section 829 of this title (article 29).".

SEC. 503. NUMBER OF COURT-MARTIAL MEMBERS IN CAPITAL CASES.

Section 825a of title 10, United States Code (article 25a of the Uniform Code of Military Justice), is amended to read as follows:

"§825a. Art. 25a. Number of court-martial members in capital cases

"(a) IN GENERAL.—In a case in which the accused may be sentenced to death, the number of members shall be 12.

"(b) CASE NO LONGER CAPITAL.—Subject to section 829 of this title (article 29)—

"(1) if a case is referred for trial as a capital case and, before the members are impaneled, the accused may no longer be sentenced to death, the number of members shall be eight; and

"(2) if a case is referred for trial as a capital case and, after the members are impaneled, the accused may no longer be sentenced to death, the number of members shall remain 12.".

SEC. 504. DETAILING, QUALIFICATIONS, ETC. OF MILITARY JUDGES.

(a) SPECIAL COURTS-MARTIAL.—Subsection (a) of section 826 of title 10, United States Code (article 26 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by inserting after "each general" the following: "and special"; and

(2) by striking the second sentence.

(b) QUALIFICATIONS.—Subsection (b) of such section (article) is amended by striking "qualified for duty" and inserting "qualified, by reason of education, training, experience, and judicial temperament, for duty".

(c) DETAIL AND ASSIGNMENT.—Subsection (c) of such section (article) is amended to read as follows:

"(c)(1) In accordance with regulations prescribed under subsection (a), a military judge of a general or special court-martial shall be designated for detail by the Judge Advocate General of the armed force of which the military judge is a member.

"(2) Neither the convening authority nor any member of the staff of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to the military judge's performance of duty as a military judge.

"(3) A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial—

"(A) may perform such duties only when the officer is assigned and directly responsible to the Judge Advocate General of the armed force of which the military judge is a member; and

"(B) may perform duties of a judicial or nonjudicial nature other than those relating to the officer's primary duty as a military judge of a general court-martial when such duties are assigned to the officer by or with the approval of that Judge Advocate General.

"(4) In accordance with regulations prescribed by the President, assignments of military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(d) DETAIL TO A DIFFERENT ARMED FORCE.—Such section (article) is further amended by adding at the end the following new subsection:

"(f) A military judge may be detailed under subsection (a) to a court-martial or a proceeding under section 830a of this title (article 30a) that is convened in a different armed force, when so permitted by the Judge Advocate General of the armed force of which the military judge is a member.".

(e) CHIEF TRIAL JUDGES.—Such section (article), as amended by subsection (d), is further amended by adding at the end the following new subsection:

"(g) In accordance with regulations prescribed by the President, each Judge Advocate General shall designate a chief trial judge from among the members of the applicable trial judiciary.".

SEC. 505. QUALIFICATIONS OF TRIAL COUNSEL AND DEFENSE COUNSEL

Section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence of paragraph (2) of subsection (a), by striking "No person" and all that follows through "trial counsel," the first place it

appears and inserting the following: "No person who, with respect to a case, has served as a preliminary hearing officer, court member, military judge, military magistrate, or appellate judge, may later serve as trial counsel,";

(2) in the first sentence of subsection (b), by striking "Trial counsel or defense counsel" and inserting "Trial counsel, defense counsel, or assistant defense counsel"; and

(3) by striking subsection (c) and inserting the following new subsections:

"(c)(1) Defense counsel and assistant defense counsel detailed for a special court-martial shall have the qualifications set forth in subsection (b).

"(2) Trial counsel and assistant trial counsel detailed for a special court-martial and assistant trial counsel detailed for a general court-martial must be determined to be competent to perform such duties by the Judge Advocate General, under such rules as the President may prescribe.

"(d) To the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

SEC. 506. ASSEMBLY AND IMPANELING OF MEMBERS; DETAIL OF NEW MEMBERS AND MILITARY JUDGES.

Section 829 of title 10, United States Code (article 29 of the Uniform Code of Military Justice), is amended to read as follows:

"§829. Art. 29. Assembly and impaneling of members; detail of new members and military judges

"(a) ASSEMBLY.—The military judge shall announce the assembly of a general or special court-martial with members. After such a court-martial is assembled, no member may be absent, unless the member is excused—

"(1) as a result of a challenge;

"(2) under subsection (b)(1)(B); or

"(3) by order of the military judge or the convening authority for disability or other good cause.

"(b) IMPANELING.—(1) Under rules prescribed by the President, the military judge of a general or special court-martial with members shall—

"(A) after determination of challenges, impanel the court-martial; and

"(B) excuse the members who, having been assembled, are not impaneled.

"(2) In a general court-martial, the military judge shall impanel—

"(A) 12 members in a capital case; and

"(B) eight members in a noncapital case.

"(3) In a special court-martial, the military judge shall impanel four members.

"(c) ALTERNATE MEMBERS.—In addition to members under subsection (b), the military judge shall impanel alternate members, if the convening authority authorizes alternate members.

"(d) DETAIL OF NEW MEMBERS.—(1) If, after members are impaneled, the membership of the court-martial is reduced to—

"(A) fewer than 12 members with respect to a general court-martial in a capital case;

"(B) fewer than six members with respect to a general court-martial in a noncapital case; or

"(C) fewer than four members with respect to a special court-martial;

the trial may not proceed unless the convening authority details new members and, from among the members so detailed, the military judge impanels new members sufficient in number to provide the membership specified in paragraph (2).

"(2) The membership referred to in paragraph (1) is as follows:

"(A) 12 members with respect to a general court-martial in a capital case.

"(B) At least six but not more than eight members with respect to a general court-martial in a noncapital case.

"(C) Four members with respect to a special court-martial.

"(e) DETAIL OF NEW MILITARY JUDGE.—If the military judge is unable to proceed with the trial because of disability or otherwise, a new military judge shall be detailed to the court-martial.

"(f) EVIDENCE.—(1) In the case of new members under subsection (d), the trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides.

"(2) In the case of a new military judge under subsection (e), the trial shall proceed as if no evidence had been introduced, unless the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new military judge, the accused, and counsel for both sides.".

SEC. 507. MILITARY MAGISTRATES.

Subchapter V of chapter 47 of title 10, United States Code, is amended by inserting after section 826 (article 26 of the Uniform Code of Military Justice) the following new section (article):

“§826a. Art. 26a. Military magistrates

“(a) QUALIFICATIONS.—A military magistrate shall be a commissioned officer of the armed forces who—

“(1) is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and

“(2) is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the Judge Advocate General of the armed force of which the officer is a member.

“(b) DUTIES.—In accordance with regulations prescribed by the Secretary concerned, in addition to duties when designated under section 819 of this title or section 830a of this title (articles 19 or 30a), a military magistrate may be assigned to perform other duties of a nonjudicial nature.”.

TITLE VI—PRE-TRIAL PROCEDURE

SEC. 601. CHARGES AND SPECIFICATIONS.

Section 830 of title 10, United States Code (article 30 of the Uniform Code of Military Justice), is amended to read as follows:

“§830. Art. 30. Charges and specifications

“(a) IN GENERAL.—Charges and specifications—

“(1) may be preferred only by a person subject to this chapter; and

"(2) shall be preferred by presentment in writing, signed under oath before a commissioned officer of the armed forces who is authorized to administer oaths.

"(b) REQUIRED CONTENT.—The writing under subsection (a) shall state that—

"(1) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

"(2) the charges and specifications are true, to the best of the knowledge and belief of the signer.

"(c) DUTY OF PROPER AUTHORITY.—When charges and specifications are preferred under subsection (a), the proper authority shall, as soon as practicable—

"(1) inform the person accused of the charges and specifications; and

"(2) determine what disposition should be made of the charges and specifications in the interest of justice and discipline.".

SEC. 602. PROCEEDINGS CONDUCTED BEFORE REFERRAL.

Subchapter VI of chapter 47 of title 10, United States Code, is amended by inserting after section 830 (article 30 of the Uniform Code of Military Justice) the following new section (article):

“§830a. Art. 30a. Proceedings conducted before referral

“(a) IN GENERAL.—(1) The President shall prescribe regulations for proceedings conducted before referral of charges and specifications to court-martial for trial.

“(2) The regulations prescribed under paragraph (1) shall—

“(A) set forth the matters that a military judge may rule upon in such proceedings;

“(B) include procedures for the review of such rulings;

“(C) include appropriate limitations to ensure that proceedings under this section extend only to matters that would be subject to consideration by a military judge in a general or special court-martial; and

“(D) provide such limitations on the relief that may be ordered under this section as the President considers appropriate.

“(3) If any matter in a proceeding under paragraph (1) becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter shall be transferred to the military judge detailed to the court-martial.

“(b) DETAIL OF MILITARY JUDGE.—The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed to proceedings under subsection (a)(1).

"(c) DISCRETION TO DESIGNATE MAGISTRATE TO PRESIDE.—In accordance with regulations prescribed by the Secretary concerned, a military judge detailed to a proceeding under subsection (a)(1) may designate a military magistrate to preside over the proceeding.".

SEC. 603. PRELIMINARY HEARING REQUIRED BEFORE REFERRAL TO GENERAL COURT-MARTIAL.

(a) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended by striking the section heading and subsections (a), (b), and (c), and inserting the following:

"§832. Art. 32. Preliminary hearing required before referral to general court-martial

"(a) IN GENERAL.—(1)(A) Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an impartial hearing officer, detailed by the convening authority in accordance with subsection (b).

"(B) Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required.

"(2) The issues for determination at a preliminary hearing are limited to the following:

"(A) Whether or not the specification alleges an offense under this chapter.

"(B) Whether or not there is probable cause to believe that the accused committed the offense charged.

"(C) Whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

"(b) HEARING OFFICER.—(1) A preliminary hearing under this section shall be conducted by an impartial hearing officer, who—

"(A) whenever practicable, shall be a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)); or

"(B) in exceptional circumstances, shall be an impartial hearing officer, who is not a judge advocate so certified.

"(2) In the case of a hearing officer under paragraph (1)(B), a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)) shall be available to provide legal advice to the hearing officer.

"(3) Whenever practicable, the hearing officer shall be equal in grade or senior in grade to military counsel who are detailed to represent the accused or the Government at the preliminary hearing.

"(c) REPORT TO CONVENING AUTHORITY.—After a preliminary hearing under this section, the hearing officer shall submit to the convening authority a written report (accompanied by a recording of the preliminary hearing under subsection (e)) that includes the following:

"(1) For each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (a)(2), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.

"(2) Recommendations for any necessary modifications to the form of the charges or specifications.

"(3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense, that, under such rules as the President may prescribe, is relevant to disposition under sections 830 and 834 of this title (articles 30 and 34).

"(4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (f).".

(b) SUNDRY AMENDMENTS.—Subsection (d) of such section (article) is amended—

(1) in paragraph (1), by striking "subsection (a)" in the first sentence and inserting "this section";

(2) in paragraph (2), by striking "in defense" and all that follows through the end and inserting "that is relevant to the issues for determination under subsection (a)(2).";

(3) in paragraph (3), by adding at the end the following new sentence: "A declination under this paragraph shall not serve as the sole basis for ordering a deposition under section 849 of this title (article 49)."; and

(4) in paragraph (4), by striking "the limited purposes of the hearing, as provided in subsection (a)(2)." and inserting the following: "determinations under subsection (a)(2).".

(c) REFERENCE TO MCM.—Subsection (e) of such section (article) is amended by striking "as prescribed by the Manual for Courts-Martial" in the second sentence and inserting "under such rules as the President may prescribe".

(d) EFFECT OF VIOLATION.—Subsection (g) of such section (article) is amended by adding at the end the following new sentence: "A defect in a report under subsection (c) is not a basis for relief if the report is in substantial compliance with that subsection.".

SEC. 604. DISPOSITION GUIDANCE.

Section 833 of title 10, United States Code (article 33 of the Uniform Code of Military Justice), is amended to read as follows:

"**§833. Art. 33. Disposition guidance**

"The President shall direct the Secretary of Defense to issue, in consultation with the Secretary of Homeland Security, non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.".

SEC. 605. ADVICE TO CONVENING AUTHORITY BEFORE REFERRAL FOR TRIAL.

Section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), is amended to read as follows:

"§834. Art. 34. Advice to convening authority before referral for trial

"(a) GENERAL COURT-MARTIAL.—

"(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.—Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—

"(A) the specification alleges an offense under this chapter;

"(B) there is probable cause to believe that the accused committed the offense charged; and

"(C) a court-martial would have jurisdiction over the accused and the offense.

"(2) STAFF JUDGE ADVOCATE RECOMMENDATION AS TO DISPOSITION.—Together with the written advice provided under paragraph (1), the staff judge advocate shall provide a written recommendation to the convening authority as to the disposition that should be made of the specification in the interest of justice and discipline.

"(3) STAFF JUDGE ADVOCATE ADVICE AND RECOMMENDATION TO ACCOMPANY REFERRAL.—When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate

under paragraph (1) and the written recommendation of the staff judge advocate under paragraph (2) with respect to each specification shall accompany the referral.

"(b) SPECIAL COURT-MARTIAL; CONVENING AUTHORITY CONSULTATION WITH JUDGE ADVOCATE.—Before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues.

"(c) GENERAL AND SPECIAL COURTS-MARTIAL; CORRECTION OF CHARGES AND SPECIFICATIONS BEFORE REFERRAL.—Before referral for trial by general court-martial or special court-martial, changes may be made to charges and specifications—

"(1) to correct errors in form; and

"(2) when applicable, to conform to the substance of the evidence contained in a report under section 832(c) of this title (article 32(c)).

"(d) DEFINITION.—In this section, the term 'referral' means the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial.".

SEC. 606. SERVICE OF CHARGES AND COMMENCEMENT OF TRIAL.

Section 835 of title 10, United States Code (article 35 of the Uniform Code of Military Justice), is amended to read as follows:

"§835. Art. 35. Service of charges; commencement of trial

"(a) IN GENERAL.—Trial counsel detailed for a court-martial under section 827 of this title (article 27) shall cause to be served upon the accused a copy of the charges and specifications referred for trial.

"(b) COMMENCEMENT OF TRIAL.—(1) Subject to paragraphs (2) and (3), no trial or other proceeding of a general court-martial or a special court-martial (including any session under section 839(a) of this title (article 39(a)) may be held over the objection of the accused—

"(A) with respect to a general court-martial, from the time of service through the fifth day after the date of service; or

"(B) with respect to a special court-martial, from the time of service through the third day after the date of service.

"(2) An objection under paragraph (1) may be raised only at the first session of the trial or other proceeding and only if the first session occurs before the end of the applicable period under paragraph (1)(A) or (1)(B). If the first session occurs before the end of the applicable period, the military judge shall, at that session, inquire as to whether the defense objects under this subsection.

"(3) This subsection shall not apply in time of war.".

TITLE VII—TRIAL PROCEDURE

SEC. 701. DUTIES OF ASSISTANT DEFENSE COUNSEL.

Subsection (e) of section 838 of title 10, United States Code (article 38 of the Uniform Code of Military Justice), is amended by striking ", under the direction" and all that follows through "(article 27),".

SEC. 702. SESSIONS.

Section 839 of title 10, United States Code (article 39 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by striking paragraph (3) and inserting the following new paragraphs:

"(3) holding the arraignment and receiving the pleas of the accused;

"(4) conducting a sentencing proceeding and sentencing the accused; and"; and

(2) in the second sentence of subsection (c), by striking ", in cases in which a military judge has been detailed to the court,".

SEC. 703. TECHNICAL AMENDMENT RELATING TO CONTINUANCES.

Section 840 of title 10, United States Code (article 40 of the Uniform Code of Military Justice), is amended by striking "court-martial without a military judge" and inserting "summary court-martial".

SEC. 704. CONFORMING AMENDMENTS RELATING TO CHALLENGES.

Section 841 of title 10, United States Code (article 41 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)(1), by striking ", or, if none, the court," in the second sentence;

(2) in subsection (a)(2) by striking "minimum" in the first sentence; and

(3) in subsection (b)(2), by striking "minimum".

SEC. 705. STATUTE OF LIMITATIONS.

(a) INCREASE IN PERIOD FOR CHILD ABUSE OFFENSES.—Subsection (b)(2)(A) of section 843 of title 10, United States Code (article 43 of the Uniform Code of Military Justice), is amended by striking "five years" and inserting "ten years".

(b) INCREASE IN PERIOD FOR FRAUDULENT ENLISTMENT OR APPOINTMENT OFFENSES.—Such section (article) is further amended by adding at the end the following new subsection:

"(h) FRAUDULENT ENLISTMENT OR APPOINTMENT.—A person charged with fraudulent enlistment or fraudulent appointment under section 904a(1) of this title (article 104a(1)) may be tried by court-martial if the sworn charges and specifications are received by an officer exercising summary court-martial jurisdiction with respect to that person, as follows:

"(1) In the case of an enlisted member, during the period of the enlistment or five years, whichever provides a longer period.

"(2) In the case of an officer, during the period of the appointment or five years, whichever provides a longer period.".

(c) DNA EVIDENCE.—Such section (article), as amended by subsection (b), is further amended by adding at the end the following new subsection:

"(i) DNA EVIDENCE.—If DNA testing implicates an identified person in the commission of an offense punishable by confinement for more than one year, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.".

(d) CONFORMING AMENDMENTS.—Such section (article) is further amended in subsection (b)(2)(B) by striking clauses (i) through (v) and inserting the following:

"(i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).

"(ii) Maiming in violation of section 928a of this title (article 128a).

"(iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).

"(iv) Kidnapping in violation of section 925 of this title (article 125).".

(e) APPLICATION.—The amendments made by subsections (a), (b), (c), and (d) shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this subsection if the applicable limitation period has not yet expired.

SEC. 706. FORMER JEOPARDY.

Subsection (c) of section 844 of title 10, United States Code (article 44 of the Uniform Code of Military Justice), is amended to read as follows:

"(c)(1) A court-martial with a military judge alone is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after introduction of evidence; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.

"(2) A court-martial with a military judge and members is a trial in the sense of this section (article) if, without fault of the accused—

"(A) after the members, having taken an oath as members under section 842 of this title (article 42) and after completion of challenges under section 841 of this title (article 41), are impaneled; and

"(B) before announcement of findings under section 853 of this title (article 53);

the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses.".

SEC. 707. PLEAS OF THE ACCUSED.

(a) PLEAS OF GUILTY.—Subsection (b) of section 845 of title 10, United States Code (article 45 of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking "may be adjudged" and inserting "is mandatory"; and

(2) in the second sentence—

(A) by striking "or by a court-martial without a military judge"; and

(B) by striking ", if permitted by regulations of the Secretary concerned,".

(b) HARMLESS ERROR.—Such section (article) is further amended by adding at the end the following new subsection:

"(c) HARMLESS ERROR.—A variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused.".

SEC. 708. SUBPOENA AND OTHER PROCESS.

(a) IN GENERAL.—Section 846 of title 10, United States Code (article 46 of the Uniform Code of Military Justice), is amended as follows:

(1) Subsection (a) of such section (article) is amended—

(A) in the heading, by inserting, "IN TRIALS BY COURTS-MARTIAL" after "EVIDENCE"; and

(B) by striking "The counsel for the Government, the counsel for the accused," and inserting "In a case referred for trial by court-martial, the trial counsel, the defense counsel,".

(2) Subsection (b) of such section (article) is amended to read as follows:

"(b) SUBPOENA AND OTHER PROCESS GENERALLY.—Any subpoena or other process issued under this section (article)—

"(1) shall be similar to that which courts of the United States having criminal jurisdiction may issue;

"(2) shall be executed in accordance with regulations prescribed by the President; and

"(3) shall run to any part of the United States and to the Commonwealths and possessions of the United States.".

(3) Subsection (c) of such section (article) is amended to read as follows:

"(c) SUBPOENA AND OTHER PROCESS FOR WITNESSES.—A subpoena or other process may be issued to compel a witness to appear and testify—

"(1) before a court-martial, military commission, or court of inquiry;

"(2) at a deposition under section 849 of this title (article 49); or

"(3) as otherwise authorized under this chapter."

(4) The following new subsections are added at the end of such section (article):

"(d) SUBPOENA AND OTHER PROCESS FOR EVIDENCE.—

"(1) IN GENERAL.—A subpoena or other process may be issued to compel the production of evidence—

"(A) for a court-martial, military commission, or court of inquiry;

"(B) for a deposition under section 849 of this title (article 49);

"(C) for an investigation of an offense under this chapter; or

"(D) as otherwise authorized under this chapter.

"(2) INVESTIGATIVE SUBPOENA.—An investigative subpoena under paragraph (1)(C) may be issued before referral of charges to a court-martial only if a general court-martial convening authority has authorized counsel for the Government to issue such a subpoena.

"(3) WARRANT OR ORDER FOR WIRE OR ELECTRONIC COMMUNICATIONS.—With respect to an investigation of an offense under this chapter, a military judge detailed in accordance with section 826 or 830a of this title (article 26 or 30a), may issue warrants or court orders for the contents of, and records concerning, wire or electronic communications in the same manner as such warrants and orders may be issued by a district court of the United States under chapter 121 of title 18, subject to such limitations as the President may prescribe by regulation.

"(e) REQUEST FOR RELIEF FROM SUBPOENA OR OTHER PROCESS.—If a person requests relief from a subpoena or other process under this section (article) on grounds that compliance is unreasonable or oppressive or is prohibited by law, a

military judge detailed in accordance with section 826 or 830a of this title (article 26 or 30a) shall review the request and shall—

"(1) order that the subpoena or other process be modified or withdrawn, as appropriate; or

"(2) order the person to comply with the subpoena or other process."

(b) CONFORMING AMENDMENTS.—(1) Section 2703 of title 18, United States Code, is amended—

(A) in the first sentence of subsection (a);

(B) in subsection (b)(1)(A); and

(C) in subsection (c)(1)(A);

by inserting after "warrant procedures" the following: "and, in the case of a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President".

(2) Section 2711(3) of title 18, United States Code, is amended by—

(A) striking "or" at the end of subparagraph (A);

(B) striking "and" at the end of subparagraph (B) and inserting "or"; and

(C) adding the following new subparagraph:

"(C) a court-martial or other proceeding under chapter 47 of title 10 (the Uniform Code of Military Justice), to which a military judge has been detailed; and".

SEC. 709. REFUSAL OF PERSON NOT SUBJECT TO UCMJ TO APPEAR, TESTIFY, OR PRODUCE EVIDENCE.

(a) IN GENERAL.—Subsection (a) of section 847 of title 10, United States Code (article 47 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) IN GENERAL.—(1) Any person described in paragraph (2)—

"(A) who willfully neglects or refuses to appear; or

"(B) who willfully refuses to qualify as a witness or to testify or to produce any evidence which that person is required to produce;

is guilty of an offense against the United States.

"(2) The persons referred to in paragraph (1) are the following:

"(A) Any person not subject to this chapter—

"(i) who is issued a subpoena or other process described in subsection (c) of section 846 of this title (article 46); and

"(ii) who is provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses

attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage.

"(B) Any person not subject to this chapter who is issued a subpoena or other process described in subsection (d) of section 846 of this title (article 46).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§847. Art. 47. Refusal of person not subject to chapter to appear, testify, or produce evidence".

SEC. 710. CONTEMPT.

(a) AUTHORITY TO PUNISH.—Subsection (a) of section 848 of title 10, United States Code (article 48 of the Uniform Code of Military Justice), is amended to read as follows:

"(a) AUTHORITY TO PUNISH.—(1) With respect to any proceeding under this chapter, a judicial officer specified in paragraph (2) may punish for contempt any person who—

"(A) uses any menacing word, sign, or gesture in the presence of the judicial officer during the proceeding;

"(B) disturbs the proceeding by any riot or disorder; or

"(C) willfully disobeys a lawful writ, process, order, rule, decree, or command issued with respect to the proceeding.

"(2) A judicial officer referred to in paragraph (1) is any of the following:

"(A) Any judge of the Court of Appeals for the Armed Forces and any judge of a Court of Criminal Appeals under section 866 of this title (article 66).

"(B) Any military judge detailed to a court-martial, a provost court, a military commission, or any other proceeding under this chapter.

"(C) Any military magistrate designated to preside under section 819 or section 830a of this title (article 19 or 30a).

"(D) Any commissioned officer detailed as a summary court-martial.

"(E) The president of a court of inquiry.".

(b) REVIEW.—Such section (article) is further amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following new subsection (c):

"(c) REVIEW.—A punishment under this section—

"(1) if imposed by a military judge or military magistrate, may be reviewed by the Court of Criminal Appeals in accordance with the uniform rules of procedure for the Courts of Criminal Appeals under section 866(i) of this title (article 66(i));

"(2) if imposed by a judge of the Court of Appeals for the Armed Forces or a judge of a Court of Criminal Appeals, shall constitute a judgment of the court, subject to review under the applicable provisions of section 867 or 867a of this title (article 67 or 67a); and

"(3) if imposed by a summary court-martial or court of inquiry, shall be subject to review by the convening authority in accordance with rules prescribed by the President.".

(c) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§848. Art. 48. Contempt".

SEC. 711. DEPOSITIONS.

Section 849 of title 10, United States Code (article 49 of the Uniform Code of Military Justice), is amended to read as follows:

"§849. Art. 49. Depositions

"(a) IN GENERAL.—(1) Subject to paragraph (2), a convening authority or a military judge may order depositions at the request of any party.

"(2) A deposition may be ordered under paragraph (1) only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be preserved for use at a court-martial, military commission, court of inquiry, or other military court or board.

"(3) A party who requests a deposition under this section shall give to every other party reasonable written notice of the time and place for the deposition.

"(4) A deposition under this section shall be taken before, and authenticated by, an impartial officer, as follows:

"(A) Whenever practicable, by an impartial judge advocate certified under section 827(b) of this title (article 27(b)).

"(B) In exceptional circumstances, by an impartial military or civil officer authorized to administer oaths by (i) the laws of the United States or (ii) the laws of the place where the deposition is taken.

"(b) REPRESENTATION BY COUNSEL.—Representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under section 827 of this title (article 27). In addition, the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in section 838(b) of this title (article 38(b)).

"(c) ADMISSIBILITY AND USE AS EVIDENCE.—A deposition order under subsection (a) does not control the admissibility of the deposition in a court-martial or other proceeding under this chapter. Except as provided by subsection (d), a party may use all or part of a deposition as provided by the rules of evidence.

"(d) CAPITAL CASES.—Testimony by deposition may be presented in capital cases only by the defense.".

SEC. 712. ADMISSIBILITY OF SWORN TESTIMONY BY AUDIOTAPE OR VIDEOTAPE FROM RECORDS OF COURTS OF INQUIRY.

(a) IN GENERAL.—Section 850 of title 10, United States Code (article 50 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) AUDIOTAPE OR VIDEOTAPE.—Sworn testimony that—

"(1) is recorded by audiotape, videotape, or similar method; and

"(2) is contained in the duly authenticated record of proceedings of a court of inquiry;

is admissible before a court-martial, military commission, court of inquiry, or military board, to the same extent as sworn testimony may be read in evidence before any such body under subsection (a), (b), or (c).".

(b) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§850. Art. 50. Admissibility of sworn testimony from records of courts of inquiry".

SEC. 713. CONFORMING AMENDMENT RELATING TO DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

Section 850a(c) of title 10, United States Code (article 50a(c) of the Uniform Code of Military Justice), is amended by striking ", or the president of a court-martial without a military judge,".

SEC. 714. VOTING AND RULINGS.

Section 851 of title 10, United States Code (article 51 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking ", and by members of a court-martial without a military judge upon questions of challenge," in the first sentence;

(2) in subsection (b)—

(A) by striking "and, except for questions of challenge, the president of a court-martial without a military judge" in the first sentence; and

(B) by striking ", or by the president" in the second sentence and all that follows through the end of the subsection and inserting "is final and constitutes the ruling of the court, except that the military judge may change a ruling at any time during trial."; and

(3) in subsection (c), by striking "or the president of a court-martial without a military judge" in the matter before paragraph (1).

SEC. 715. VOTES REQUIRED FOR CONVICTION, SENTENCING, AND OTHER MATTERS.

Section 852 of title 10, United States Code (article 52 of the Uniform Code of Military Justice), is amended to read as follows:

"§852. Art. 52. Votes required for conviction, sentencing, and other matters

"(a) IN GENERAL.—No person may be convicted of an offense in a general or special court-martial, other than—

"(1) after a plea of guilty under section 845(b) of this title (article 45(b));

"(2) by a military judge in a court-martial with a military judge alone, under section 816 of this title (article 16); or

"(3) in a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken.

"(b) LEVEL OF CONCURRENCE REQUIRED.—

"(1) IN GENERAL—Except as provided in subsection (a) and in paragraph (2), all matters to be decided by members of a general or special court-martial shall be determined by a majority vote, but a reconsideration of a finding of guilty or reconsideration of a sentence, with a view toward decreasing the sentence, may be made by any lesser vote which indicates

that the reconsideration is not opposed by the number of votes required for that finding or sentence.

"(2) SENTENCING.—A sentence of death requires (A) a unanimous finding of guilty of an offense in this chapter expressly made punishable by death and (B) a unanimous determination by the members that the sentence for that offense shall include death. All other sentences imposed by members shall be determined by the concurrence of at least three-fourths of the members present when the vote is taken.".

SEC. 716. FINDINGS AND SENTENCING.

Section 853 of title 10, United States Code (article 53 of the Uniform Code of Military Justice), is amended to read as follows:

"§853. Art. 53. Findings and sentencing

"(a) ANNOUNCEMENT.—A court-martial shall announce its findings and sentence to the parties as soon as determined.

"(b) SENTENCING GENERALLY.—(1) Except as provided in subsection (c) for capital offenses, if the accused is convicted of an offense in a trial by general or special court-martial, the military judge shall sentence the accused. The sentence determined by the military judge constitutes the sentence of the court-martial.

"(2) If the accused is convicted of an offense in a trial by summary court-martial, the court-martial shall sentence the accused.

"(c) SENTENCING FOR CAPITAL OFFENSES.—(1) In a capital case, if the accused is convicted of an offense for which the court-martial may sentence the accused to death—

"(A) the members shall determine whether the sentence for that offense shall be death, life in prison without eligibility for parole, or a lesser punishment determined by the military judge; and

"(B) the military judge shall sentence the accused for that offense in accordance with the determination of the members under subparagraph (A).

"(2) In accordance with regulations prescribed by the President, the military judge may include in any sentence to death or life in prison without eligibility for parole other lesser punishments authorized under this chapter.".

SEC. 717. PLEA AGREEMENTS.

Subchapter VII of chapter 47 of title 10, United States Code, is amended by inserting after section 853 (article 53 of the Uniform Code of Military Justice) the following:

"§853a. Art. 53a. Plea agreements

"(a) IN GENERAL.—(1) At any time before the announcement of findings under section 853 of this title (article 53), the convening authority and the accused may enter into a plea agreement with respect to such matters as—

"(A) the manner in which the convening authority will dispose of one

or more charges and specifications; and

"(B) limitations on the sentence that may be adjudged for one or more charges and specifications.

"(2) The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms and conditions of a plea agreement.

"(b) ACCEPTANCE OF PLEA AGREEMENT.—Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that—

"(1) in the case of an offense with a sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

"(2) in the case of an offense with no sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge of a general or special court-martial shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties;

"(2) contains a provision that is not understood by the accused; or

"(3) except as provided in subsection (d), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)).

"(d) LIMITED CONDITIONS FOR ACCEPTANCE OF PLEA AGREEMENT FOR SENTENCE BELOW MANDATORY MINIMUM FOR CERTAIN OFFENSES.—With respect to an offense referred to in section 856(b)(2) of this title (article 56(b)(2))—

"(1) the military judge may accept a plea agreement that provides for a sentence of bad conduct discharge; and

"(2) upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the military judge may accept a plea agreement that provides for a sentence that is less than the mandatory minimum sentence for the offense charged.

"(e) BINDING EFFECT OF PLEA AGREEMENT.—Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the military judge.".

SEC. 718. RECORD OF TRIAL.

Section 854 of title 10, United States Code (article 54 of the Uniform Code of Military Justice), is amended—

(1) by striking subsection (a) and inserting the following:

"(a) GENERAL AND SPECIAL COURTS-MARTIAL.—Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a court-reporter, except that in the case of death, disability, or absence of a court reporter, the record shall be certified by an official selected as the President may prescribe by regulation.";

(2) in subsection (b)—

(A) by striking "(b) Each special and summary court-martial" and inserting "(b) SUMMARY COURT-MARTIAL.—Each summary court-martial"; and

(B) by striking "authenticated" and inserting "certified";

(3) by striking subsection (c) and inserting the following:

"(c) CONTENTS OF RECORD.—(1) Except as provided in paragraph (2), the record shall contain such matters as the President may prescribe by regulation.

"(2) In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of

death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.".

(4) in subsection (d)—

(A) by striking "(d) A copy" and inserting "(d) COPY TO ACCUSED.— A copy"; and

(B) by striking "authenticated" and inserting "certified"; and

(5) in subsection (e)—

(A) by striking "involving a sexual assault or other offense covered by section 920 of this title (article 120)" in the first sentence and inserting "upon request,"; and

(B) by striking "authenticated" in the second sentence and inserting "certified".

TITLE VIII—SENTENCES

SEC. 801. SENTENCING.

(a) IN GENERAL.—Section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended to read as follows:

"§856. Art. 56. Sentencing

"(a) SENTENCE MAXIMUMS.—The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

"(b) SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—(1) Except as provided in subsection (d) of section 853a of this title (article 53a), punishment for any offense specified in paragraph (2) shall include dismissal or dishonorable discharge, as applicable.

"(2) The offenses referred to in paragraph (1) are as follows:

"(A) Rape under subsection (a) of section 920 of this title (article 120).

"(B) Sexual assault under subsection (b) of such section (article).

"(C) Rape of a child under subsection (a) of section 920b of this title (article 120b).

"(D) Sexual assault of a child under subsection (b) of such section (article).

"(E) An attempt to commit an offense specified in subparagraph (A), (B), (C), or (D) that is punishable under section 880 of this title (article 80).

"(c) IMPOSITION OF SENTENCE.—

"(1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

"(A) the nature and circumstances of the offense and the history and characteristics of the accused;

"(B) the impact of the offense on—

"(i) the financial, social, psychological, or medical well-being of any victim of the offense; and

"(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

"(C) the need for the sentence—

"(i) to reflect the seriousness of the offense;

"(ii) to promote respect for the law;

"(iii) to provide just punishment for the offense;

"(iv) to promote adequate deterrence of misconduct;

"(v) to protect others from further crimes by the accused;

"(vi) to rehabilitate the accused; and

"(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

"(D) the sentences available under this chapter; and

"(E) the applicable sentencing parameters or sentencing criteria prescribed under this section.

"(2) APPLICATION OF SENTENCING PARAMETERS IN GENERAL AND SPECIAL COURTS-MARTIAL.—

"(A) Except as provided in subparagraph (B), in a general or special court-martial in which the accused is convicted of an offense with a sentencing parameter under subsection (d), the military judge shall sentence the accused for that offense within the applicable parameter.

"(B) The military judge may impose a sentence outside a sentencing parameter upon finding specific facts that warrant such a sentence. The military judge shall include in the record a written statement of the factual basis for any sentence under this subparagraph.

"(3) USE OF SENTENCING CRITERIA IN GENERAL AND SPECIAL COURTS-MARTIAL.—In a general or special court-martial in which the accused is convicted of an offense with sentencing criteria under subsection (d), the military judge shall consider the applicable sentencing criteria in determining the sentence for that offense.

"(4) OFFENSE BASED SENTENCING IN GENERAL AND SPECIAL COURTS-MARTIAL.—In announcing the sentence under section 853 of this title (article 53) in a general or special court-martial, the military judge shall, with

respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any. If the accused is sentenced to confinement for more than one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.

"(5) NONAPPLICABILITY TO DEATH PENALTY.—Sentencing parameters and sentencing criteria are not applicable to the issue of whether an offense should be punished by death.

"(6) SENTENCE OF CONFINEMENT FOR LIFE WITHOUT ELIGIBILITY FOR PAROLE.—(A) If an offense is subject to a sentence of confinement for life, a court-martial may impose a sentence of confinement for life without eligibility for parole.

"(B) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—

"(i) the sentence is set aside or otherwise modified as a result of—

"(I) action taken by the convening authority or the Secretary concerned; or

"(II) any other action taken during post-trial procedure and review under any other provision of subchapter IX of this chapter;

"(ii) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

"(iii) the accused is pardoned.

"(d) ESTABLISHMENT OF SENTENCING PARAMETERS AND SENTENCING CRITERIA.—

"(1) IN GENERAL.—The President shall prescribe regulations establishing sentencing parameters and sentencing criteria in accordance with this subsection.

"(2) SENTENCING PARAMETERS.—(A) A sentencing parameter provides a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—

"(i) the severity of the offense;

"(ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court;

"(iii) any military-specific sentencing factors; and

"(iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused.

"(B) Sentencing parameters established under paragraph (1)—

"(i) shall include no fewer than seven and no more than twelve offense categories;

"(ii) other than for offenses identified under paragraph (5)(B), shall assign each offense under this chapter to an offense category;

"(iii) shall delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit; and

"(iv) shall be neutral as to the race, sex, national origin, creed, sexual orientation, and socioeconomic status of offenders.

"(3) SENTENCING CRITERIA.—Sentencing criteria are factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.

"(4) MILITARY SENTENCING PARAMETERS AND CRITERIA BOARD.—

"(A) IN GENERAL.—There is established within the Department of Defense a board, to be known as the 'Military Sentencing

Parameters and Criteria Board', hereinafter referred to in this subsection as the 'Board'.

"(B) VOTING MEMBERS.—The Board shall have five voting members, as follows:

"(i) The four chief trial judges designated under section 826(g) of this title (article 26(g)), except that, if the chief trial judge of the Coast Guard is not available, the Judge Advocate General of the Coast Guard may designate as a voting member a judge advocate of the Coast Guard with substantial military justice experience.

"(ii) A trial judge of the Navy, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Navy.

"(iii) A trial judge of the Marine Corps, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Marine Corps.

"(C) NONVOTING MEMBERS.—The Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of

the Joint Chiefs of Staff, and the General Counsel of the Department of Defense shall each designate one nonvoting member of the Board.

"(D) CHAIR AND VICE-CHAIR.—The Secretary of Defense shall designate one voting member as chair of the Board and one voting member as vice-chair.

"(5) DUTIES OF BOARD.—

"(A) As directed by the President, the Board shall submit to the President for approval—

"(i) sentencing parameters for all offenses under this chapter, other than offenses that are identified by the Board as unsuitable for sentencing parameters; and

"(ii) sentencing criteria to be used by military judges in determining appropriate sentences for offenses that are identified as unsuitable for sentencing parameters.

"(B) For purposes of this paragraph, an offense is unsuitable for sentencing parameters if—

"(i) the nature of the offense is indeterminate and unsuitable for categorization; and

"(ii) there is no similar criminal offense under the laws of the United States or the laws of the District of Columbia.

"(C) The Board shall consider the appropriateness of sentencing parameters for punitive discharges, fines, reductions, forfeitures, and other punishments authorized under this chapter.

"(D) The Board shall regularly review, and propose revision to, in consideration of comments and data coming to its attention, the sentencing parameters and sentencing criteria prescribed under subsection (d)(1).

"(E) The Board shall develop means of measuring the degree to which applicable sentencing, penal, and correctional practices are effective with respect to the sentencing factors and policies set forth in this section.

"(F) In fulfilling its duties and in exercising its powers, the Board shall consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system. The Board shall establish separate advisory groups consisting of individuals with current or recent experience in command and in senior enlisted positions, individuals with experience in the trial of courts-martial, and such other groups as the Board deems appropriate.

"(G) The Board shall submit to the President proposed amendments to the rules for courts-martial with respect to sentencing

proceedings and maximum punishments, together with statements explaining the basis for the proposed amendments.

"(H) The Board shall submit to the President proposed amendments to the sentencing parameters and sentencing criteria, together with statements explaining the basis for the proposed amendments.

"(I) The Board may issue nonbinding policy statements to achieve the Board's purposes and to guide military judges in fashioning appropriate sentences, including guidance on factors that may be relevant in determining where in a sentencing parameter a specification may fall, or whether a deviation outside of the sentencing range may be warranted.

"(J) The Federal Advisory Committee Act shall not apply with respect to the Board or any advisory group established by the Board.

"(6) VOTING REQUIREMENT.—An affirmative vote of at least three members is required for any action of the Board under this subsection.

"(e) APPEAL OF SENTENCE BY THE UNITED STATES.—(1) With the approval of the Judge Advocate General concerned, the Government may appeal a sentence to the Court of Criminal Appeals, on the grounds that—

"(A) the sentence violates the law;

"(B) in the case of a sentence for an offense with a sentencing parameter under this section, the sentence is a result of an incorrect application of the parameter; or

"(C) the sentence is plainly unreasonable.

"(2) An appeal under this subsection must be filed within 60 days after the date on which the judgment of a court-martial is entered into the record under section 860c of this title (article 60c).

"(3) The Government may appeal a sentence under this section only after sentencing parameters are first prescribed under subsection (f).".

(b) CONFORMING AMENDMENT.—Section 856a of title 10, United States Code (article 56a of the Uniform Code of Military Justice), is repealed.

(c) IMPLEMENTATION OF SENTENCING PARAMETERS AND CRITERIA.—(1) Not later than four years after the date of the enactment of this Act, the President shall prescribe the regulations for sentencing parameters and criteria required by subsection (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice).

(2) Not later than one year after the date of the enactment of this Act, the President shall prescribe interim guidance for use in sentencing at courts-martial before the implementation of sentencing parameters and criteria pursuant to the regulations referred to in paragraph (1). Insofar as the President considers

practicable, the interim guidance shall be consistent with the purposes and procedures set forth in subsections (c) and (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), taking into account the interim nature of the guidance. For purposes of sentencing under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the interim guidance shall be treated as sentencing parameters and criteria.

(3) The President shall prescribe the effective dates of the regulations referred to in paragraph (1) and of the interim guidance referred to in paragraph (2).

(d) PROSPECTIVE REPEAL OF SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—Upon the taking effect of sentencing parameters for offenses specified in paragraph (2) of subsection (b) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as in effect on the day after the date of the enactment of this Act—

(1) section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended—

(A) in subsection (a), by striking "(a) SENTENCE MAXIMUMS.—"; and

(B) by striking subsection (b); and

(2) section 853a of title 10, United States Code (article 53a of the Uniform Code of Military Justice), is amended by striking subsections (c) and (d) and inserting the following new subsection:

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties; or

"(2) contains a provision that is not understood by the accused.".

SEC. 802. EFFECTIVE DATE OF SENTENCES.

(a) IN GENERAL.—Section 857 of title 10, United States Code (article 57 of the Uniform Code of Military Justice), is amended to read as follows:

"§857. Art. 57. Effective date of sentences

"(a) EXECUTION OF SENTENCES.—A court-martial sentence shall be executed and take effect as follows:

"(1) FORFEITURE AND REDUCTION.—A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect. Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

"(A) the date that is 14 days after the date on which the sentence is adjudged; or

"(B) in the case of a summary court-martial, the date on which the sentence is approved by the convening authority.

"(2) CONFINEMENT.—Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

"(3) APPROVAL OF SENTENCE OF DEATH.—If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as the President sees fit. That part of the sentence providing for death may not be suspended.

"(4) APPROVAL OF DISMISSAL.—If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of

the sentence, as the Secretary sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

"(5) COMPLETION OF APPELLATE REVIEW.—If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge, that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may be executed, in accordance with service regulations, after completion of appellate review (and, with respect to death or dismissal, approval under paragraph (3) or (4), as appropriate).

"(6) OTHER SENTENCES.—Except as otherwise provided in this subsection, a general or special court-martial sentence is effective upon entry of judgment and a summary court-martial sentence is effective when the convening authority acts on the sentence.

"(b) DEFERRAL OF SENTENCES.—(1) On application by an accused, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may, in his or her sole discretion, defer the effective date of a sentence of confinement, reduction, or forfeiture. The deferment shall terminate upon entry of judgment or, in the case of a summary court-martial, when

the convening authority acts on the sentence. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

"(2) In any case in which a court-martial sentences a person referred to in paragraph (3) to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a State or foreign country referred to in that paragraph.

"(3) Paragraph (2) applies to a person subject to this chapter who—

"(A) while in the custody of a State or foreign country is temporarily returned by that State or foreign country to the armed forces for trial by court-martial; and

"(B) after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

"(4) In this subsection, the term 'State' includes the District of Columbia and any Commonwealth, territory, or possession of the United States.

"(5) In any case in which a court-martial sentences a person to confinement, but in which review of the case under section 867(a)(2) of this title (article

67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

"(c) APPELLATE REVIEW.—(1) Appellate review is complete under this section when—

"(A) a review under section 865 of this title (article 65) is completed; or

"(B) an appeal is filed with a Court of Criminal Appeals or the sentence includes death, and review is completed by a Court of Criminal Appeals and—

"(i) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

"(ii) such a petition is rejected by the Court of Appeals for the Armed Forces; or

"(iii) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

"(I) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

"(II) such a petition is rejected by the Supreme Court; or

"(III) review is otherwise completed in accordance with the judgment of the Supreme Court.

"(2) The completion of appellate review shall constitute a final judgment as to the legality of the proceedings.".

(b) CONFORMING AMENDMENTS.—(1) Subchapter VIII of chapter 47 of title 10, United States Code, is amended by striking section 857a (article 57a of the Uniform Code of Military Justice).

(2) Subchapter IX of chapter 47 of title 10, United States Code, is amended by striking section 871 (article 71 of the Uniform Code of Military Justice).

(3) The second sentence of subsection (a)(1) of section 858b of title 10, United States Code (article 58b of the Uniform Code of Military Justice), is amended by striking "section 857(a) of this title (article 57(a))" and inserting "section 857 of this title (article 57)".

SEC. 803. SENTENCE OF REDUCTION IN ENLISTED GRADE.

Section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)—

(A) by striking "as approved by the convening authority" and inserting "as set forth in the judgment of the court-martial entered into the record under section 860c of this title (article 60c)"; and

(B) in the matter after paragraph (3), by striking "of that approval" and inserting "on which the judgment is so entered"; and

(2) in subsection (b), by striking "disapproved, or, as finally approved" and inserting "reduced, or, as finally affirmed".

SEC. 804. REPEAL OF SENTENCE REDUCTION PROVISION WHEN PARAMETERS TAKE EFFECT.

Effective on the effective date of sentencing parameters prescribed by the President under section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as amended by section 801, section 858a of title 10, United States Code (article 58a of the Uniform Code of Military Justice), is repealed.

TITLE IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

SEC. 901. POST-TRIAL PROCESSING IN GENERAL AND SPECIAL COURTS-MARTIAL.

Section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

"§860. Art. 60. Post-trial processing in general and special courts-martial

"(a) STATEMENT OF TRIAL RESULTS.—(1) The military judge of a general or special court-martial shall enter into the record of trial a document entitled 'Statement of Trial Results', which shall set forth—

"(A) each plea and finding;

"(B) the sentence, if any; and

"(C) such other information as the President may prescribe by regulation.

"(2) Copies of the Statement of Trial Results shall be provided promptly to the convening authority, the accused, and any victim of the offense.

"(b) POST-TRIAL MOTIONS.—In accordance with regulations prescribed by the President, the military judge in a general or special court-martial shall address all post-trial motions and other post-trial matters that—

"(1) may affect a plea, a finding, the sentence, the Statement of Trial Results, the record of trial, or any post-trial action by the convening authority; and

"(2) are subject to resolution by the military judge before entry of judgment.".

SEC. 902. LIMITED AUTHORITY TO ACT ON SENTENCE IN SPECIFIED POST-TRIAL CIRCUMSTANCES.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860 (article 60 of the Uniform Code of Military Justice), as amended by section 901, the following new section (article):

"§860a. Art. 60a. Limited authority to act on sentence in specified post-trial circumstances

"(a) IN GENERAL.—(1) The convening authority of a general or special court-martial described in paragraph (2)—

"(A) may act on the sentence of the court-martial only as provided in subsection (b), (c), or (d); and

"(B) may not act on the findings of the court-martial.

"(2) The courts-martial referred to in paragraph (1) are the following:

"(A) A general or special court-martial in which the maximum sentence of confinement established under subsection (a) of section 856 of this title (article 56) for any offense of which the accused is found guilty is more than two years.

"(B) A general or special court-martial in which the total of the sentences of confinement imposed, running consecutively, is more than six months.

"(C) A general or special court-martial in which the sentence imposed includes a dismissal, dishonorable discharge, or bad-conduct discharge.

"(D) A general or special court-martial in which the accused is found guilty of a violation of subsection (a) or (b) of section 920 of this title (article 120), section 920b of this title (article 120b), or such other offense as the Secretary of Defense may specify by regulation.

"(3) Except as provided in subsection (d), the convening authority may act under this section only before entry of judgment.

"(4) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) REDUCTION, COMMUTATION, AND SUSPENSION OF SENTENCES GENERALLY.—(1) Except as provided in subsection (c) or (d), the convening authority may not reduce, commute, or suspend any of the following sentences:

"(A) A sentence of confinement, if the total period of confinement imposed for all offenses involved, running consecutively, is greater than six months.

"(B) A sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(C) A sentence of death.

"(2) The convening authority may reduce, commute, or suspend any sentence not specified in paragraph (1).

"(c) SUSPENSION OF CERTAIN SENTENCES UPON RECOMMENDATION OF MILITARY JUDGE.—(1) Upon recommendation of the military judge, as included in the Statement of Trial Results, together with an explanation of the facts supporting the recommendation, the convening authority may suspend—

"(A) a sentence of confinement, in whole or in part; or

"(B) a sentence of dismissal, dishonorable discharge, or bad-conduct discharge.

"(2) The convening authority may not, under paragraph (1)—

"(A) suspend a mandatory minimum sentence; or

"(B) suspend a sentence to an extent in excess of the suspension recommended by the military judge.

"(d) REDUCTION OF SENTENCE FOR SUBSTANTIAL ASSISTANCE BY ACCUSED.—(1) Upon a recommendation by the trial counsel, if the accused, after sentencing and before entry of judgment, provides substantial assistance in the investigation or prosecution of another person, the convening authority may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(2) Upon a recommendation by a trial counsel, designated in accordance with rules prescribed by the President, if the accused, after entry of judgment, provides substantial assistance in the investigation or prosecution of another person, a convening authority, designated under such regulations, may reduce, commute, or suspend a sentence, in whole or in part, including any mandatory minimum sentence.

"(3) In evaluating whether the accused has provided substantial assistance under this subsection, the convening authority may consider the presentence assistance of the accused.

"(e) SUBMISSIONS BY ACCUSED AND VICTIM.—(1) In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of an offense. Such rules shall include—

"(A) procedures for notice of the opportunity to make such submissions;

"(B) the deadlines for such submissions; and

"(C) procedures for providing the accused and any victim of an offense with a copy of the recording of any open sessions of the court-martial and copies of, or access to, any admitted, unsealed exhibits.

"(2) The convening authority shall not consider under this section any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.

"(f) DECISION OF CONVENING AUTHORITY.—(1) The decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If, under this section, the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall include a written explanation of the reasons for such action.

"(3) If, under subsection (d)(2), the convening authority reduces, commutes, or suspends the sentence, the decision of the convening authority shall be forwarded to the chief trial judge for appropriate modification of the entry of judgment, which shall be transmitted to the Judge Advocate General for appropriate action.".

SEC. 903. POST-TRIAL ACTIONS IN SUMMARY COURTS-MARTIAL AND CERTAIN GENERAL AND SPECIAL COURTS-MARTIAL.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860a (article 60a of the Uniform Code of Military Justice), as amended by section 902, the following new section (article):

"§860b. Art. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial

"(a) IN GENERAL.—(1) In a court-martial not specified in subsection (a)(2) of section 860a of this title (article 60a), the convening authority may—

"(A) dismiss any charge or specification by setting aside the finding of guilty;

"(B) change a finding of guilty to a charge or specification to a finding of guilty to a lesser included offense;

"(C) disapprove the findings and the sentence and dismiss the charges and specifications;

"(D) disapprove the findings and the sentence and order a rehearing as to the findings and the sentence;

"(E) disapprove, commute, or suspend the sentence, in whole or in part; or

"(F) disapprove the sentence and order a rehearing as to the sentence.

"(2) In a summary court-martial, the convening authority shall approve the sentence or take other action on the sentence under paragraph (1).

"(3) Except as provided in paragraph (4), the convening authority may act under this section only before entry of judgment.

"(4) The convening authority may act under this section after entry of judgment in a general or special court-martial in the same manner as the convening authority may act under subsection (d)(2) of section 860a of this title (article 60a). Such action shall be forwarded to the chief trial judge, who shall ensure appropriate modification to the entry of judgment and shall transmit the entry of judgment to the Judge Advocate General for appropriate action.

"(5) Under regulations prescribed by the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(b) LIMITATIONS ON REHEARINGS.—The convening authority may not order a rehearing under this section—

"(1) as to the findings, if there is insufficient evidence in the record to support the findings;

"(2) to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

"(3) to reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter.

"(c) SUBMISSIONS BY ACCUSED AND VICTIM.—In accordance with rules prescribed by the President, in determining whether to act under this section, the convening authority shall consider matters submitted in writing by the accused or any victim of the offense. Such rules shall include the matter required by subsection (e) of section 860a of this title (article 60a).

"(d) DECISION OF CONVENING AUTHORITY.—(1) In a general or special court-martial, the decision of the convening authority under this section shall be forwarded to the military judge, with copies provided to the accused and to any victim of the offense.

"(2) If the convening authority acts on the findings or the sentence under subsection (a)(1), the decision of the convening authority shall include a written explanation of the reasons for such action.".

SEC. 904. ENTRY OF JUDGMENT.

Subchapter IX of chapter 47 of title 10, United States Code, is amended by inserting after section 860b (article 60b of the Uniform Code of Military Justice), as added by section 903, the following new section (article):

"§860c. Art 60c. Entry of judgment

"(a) ENTRY OF JUDGMENT OF GENERAL OR SPECIAL COURT-MARTIAL.—(1) In accordance with rules prescribed by the President, in a general or special court-

martial, the military judge shall enter into the record of trial the judgment of the court. The judgment of the court shall consist of the following:

"(A) The Statement of Trial Results under section 860 of this title (article 60).

"(B) Any modifications of, or supplements to, the Statement of Trial Results by reason of—

"(i) any post-trial action by the convening authority; or

"(ii) any ruling, order, or other determination of the military judge that affects a plea, a finding, or the sentence.

"(2) Under rules prescribed by the President, the judgment under paragraph (1) shall be—

"(A) provided to the accused and to any victim of the offense; and

"(B) made available to the public.

"(b) SUMMARY COURT-MARTIAL JUDGMENT.—The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under section 860b of this title (article 60b), constitutes the judgment of the court-martial and shall be recorded and distributed under rules prescribed by the President.".

SEC. 905. WAIVER OF RIGHT TO APPEAL AND WITHDRAWAL OF APPEAL.

Section 861 of title 10, United States Code (article 61 of the Uniform Code of Military Justice), is amended to read as follows:

"§861. Art. 61. Waiver of right to appeal; withdrawal of appeal

"(a) WAIVER OF RIGHT TO APPEAL.—After entry of judgment in a general or special court-martial, under procedures prescribed by the Secretary concerned, the accused may waive the right to appeal. Such a waiver shall be —

"(1) signed by the accused and by defense counsel; and

"(2) attached to the record of trial.

"(b) WITHDRAWAL OF APPEAL.—In a general or special court-martial, the accused may withdraw an appeal at any time.

"(c) DEATH PENALTY CASE EXCEPTION.—Notwithstanding subsections (a) and (b), an accused may not waive the right to appeal or withdraw an appeal with respect to a judgment that includes a sentence of death.

"(d) WAIVER OR WITHDRAWAL AS BAR.—A waiver or withdrawal under this section bars review under section 866 of this title (article 66).".

SEC. 906. APPEAL BY THE UNITED STATES.

Section 862 of title 10, United States Code (article 62 of the Uniform Code of Military Justice), is amended—

(1) in paragraph (1) of subsection (a)—

(A) in the matter before subparagraph (A), by striking "court-martial" and all that follows through the colon at the end and inserting "general or special court-martial or in a pretrial proceeding under section 830a of this title (article 30a), the United States may appeal the following:"; and

(B) by adding at the end the following new subparagraph:

"(G) An order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.";

(2) in paragraph (2) of subsection (a)—

(A) by striking "(2)" and inserting "(2)(A)"; and

(B) by adding at the end the following new subparagraph:

"(B) An appeal of an order or ruling may not be taken when prohibited by section 844 of this title (article 44)."; and

(3) by adding at the end the following:

"(d) The United States may appeal a ruling or order of a military magistrate in the same manner as had the ruling or order been made by a military judge, except that the issue shall first be presented to the military judge who designated the military magistrate or to a military judge detailed to hear the issue.

"(e) The provisions of this article shall be liberally construed to effect its purposes.".

SEC. 907. REHEARINGS.

Section 863 of title 10, United States Code (article 63 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a)" before "Each rehearing";

(2) in the second sentence, by striking "may be approved" and inserting "may be adjudged";

(3) by striking the third sentence; and

(4) by adding at the end the following new subsections:

"(b) If the sentence adjudged by the first court-martial was in accordance with a plea agreement under section 853a of this title (article 53a) and the accused at the rehearing does not comply with the agreement, or if a plea of guilty was entered for an offense at the first court-martial and a plea of not guilty was entered at the rehearing, the sentence as to those charges or specifications may include any punishment not in excess of that which could have been adjudged at the first court-martial.

"(c) If, after appeal by the Government under section 856(e) of this title (article 56(e)), the sentence adjudged is set aside and a rehearing on sentence is ordered by the Court of Criminal Appeals or Court of Appeals for the Armed

Forces, the court-martial may impose any sentence that is in accordance with the order or ruling setting aside the adjudged sentence.”.

SEC. 908. JUDGE ADVOCATE REVIEW OF FINDING OF GUILTY IN SUMMARY COURT-MARTIAL.

(a) IN GENERAL.—Subsection (a) of section 864 of title 10, United States Code (article 64 of the Uniform Code of Military Justice), is amended by striking the first two sentences and inserting the following:

“(a) IN GENERAL.—Under regulations prescribed by the Secretary concerned, each summary court-martial in which there is a finding of guilty shall be reviewed by a judge advocate. A judge advocate may not review a case under this subsection if the judge advocate has acted in the same case as an accuser, preliminary hearing officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense.”.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The heading for such section (article) is amended to read as follows:

“§864. Art. 64. Judge advocate review of finding of guilty in summary court-martial”.

(2) Subsection (b) of such section is amended—

(A) by striking “(b) The record” and inserting “(b) RECORD.—The record”;

(B) by inserting "or" at the end of paragraph (1);

(C) by striking paragraph (2); and

(D) by redesignating paragraph (3) as paragraph (2).

(3) Subsection (c)(3) of such section (article) is amended by striking "section 869(b) of this title (article 69(b))." and inserting "section 869 of this title (article 69).".

SEC. 909. TRANSMITTAL AND REVIEW OF RECORDS.

Section 865 of title 10, United States Code (article 65 of the Uniform Code of Military Justice), is amended to read as follows:

"§865. Art. 65. Transmittal and review of records

"(a) TRANSMITTAL OF RECORDS.—(1) If the judgment of a general or special court-martial entered under section 860c of this title (article 60c) includes a finding of guilty, the record shall be transmitted to the Judge Advocate General.

"(2) In all other cases, records of trial by court-martial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

"(b) CASES ELIGIBLE FOR DIRECT APPEAL—

"(1) MANDATORY REVIEW.—If the judgment includes a sentence of death, the Judge Advocate General shall forward the record of trial to the

Court of Criminal Appeals for review under section 866(b)(2) of this title (article 66(b)(2)).

"(2) CASES ELIGIBLE FOR DIRECT APPEAL REVIEW.—(A) If the case is eligible for direct review under section 866(b)(1) of this title (article 66(b)(1)), the Judge Advocate General shall—

"(i) forward a copy of the record of trial to an appellate defense counsel who shall be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals; and

"(ii) upon written request of the accused, forward a copy of the record of trial to civilian counsel provided by the accused.

"(B) Subparagraph (A) shall not apply if the accused—

"(i) waives the right to appeal under section 61 of this title (article 61); or

"(ii) declines in writing the detailing of appellate defense counsel under paragraph (2)(A)(i).

"(c) NOTICE OF RIGHT TO APPEAL.—(1) The Judge Advocate General shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1)) by means of depositing in the United States mails for delivery by first class certified mail to the accused at an address provided by the

accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the official service record of the accused.

"(2) Paragraph (1) shall not apply if the accused waives the right to appeal under section 61 of this title (article 61).

"(d) REVIEW BY JUDGE ADVOCATE GENERAL.—

"(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

"(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (2) of section 866(b) of this title (article 66(b)).

"(B) A review referred to in subparagraph (A) shall include a written decision providing each of the following:

"(i) A conclusion as to whether the court had jurisdiction over the accused and the offense.

"(ii) A conclusion as to whether the charge and specification stated an offense.

"(iii) A conclusion as to whether the sentence was within the limits prescribed as a matter of law.

"(iv) A response to each allegation of error made in writing by the accused.

"(3) REVIEW WHEN DIRECT APPEAL IS WAIVED, WITHDRAWN OR NOT FILED.—

"(A) A review under subparagraph (B) shall be completed in each general and special court-martial if—

"(i) the accused waives the right to appeal or withdraws appeal under section 861 of this title (article 61); or

"(ii) the accused does not file a timely appeal in a case eligible for direct appeal under subparagraph (A) or (B) of section 866(b)(1) of this title (article 66(b)(1)).

"(B) A review referred to in subparagraph (A) shall include a written decision limited to providing conclusions on the matters specified in clauses (i), (ii), and (iii) of paragraph (2)(B).

"(e) REMEDY.—(1) If after a review of a record under subsection (d), the attorney conducting the review believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part.

"(2) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

"(3)(A) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(B) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.".

SEC. 910. COURTS OF CRIMINAL APPEALS.

(a) APPELLATE MILITARY JUDGES.—Subsection (a) of section 866 of chapter 47 of title 10, United States Code (article 66 of the Uniform Code of Military Justice), is amended—

(1) in the second sentence, by striking "subsection (f)" and inserting "subsection (i)";

(2) in the fourth sentence, by inserting after "highest court of a State" the following: "and must be certified by the Judge Advocate General as qualified, by reason of education, training, experience, and judicial temperament, for duty as an appellate military judge"; and

(3) by adding at the end the following new sentence: "In accordance with regulations prescribed by the President, assignments of appellate

military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.".

(b) REVISION OF APPELLATE PROCEDURES.—Such section (article) is further amended—

(1) by redesignating subsections (e), (f), (g), and (h) as subsections (h), (i), (j), and (k), respectively; and

(2) by striking subsections (b), (c), and (d) and inserting the following new subsections:

"(b) REVIEW.—

"(1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction of a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c), as follows:

"(A) On appeal by the accused in a case in which the sentence extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for more than six months.

"(B) On appeal by the accused in a case in which the Government previously filed an appeal under sections 856(e) or 862 of this title (articles 56(e) or 62).

"(C) In a case in which the accused filed an application for review with the Court under section 869(d)(1)(B) of this title (article 69(d)(1)(B)) and the application has been granted by the Court.

"(2) REVIEW OF CAPITAL CASES.—A Court of Criminal Appeals shall have jurisdiction of a court-martial in which the judgment entered into the record under section 860c of this title (article 60c) includes a sentence of death.

"(c) TIMELINESS.—An appeal under subsection (b) is timely if it is filed as follows:

"(1) In the case of an appeal by the accused under subsection (b)(1)(A) or (b)(1)(B), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article 65(c)); or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(2) In the case of an appeal by the accused under subsection (b)(1)(C), if filed before the later of—

"(A) the end of the 90-day period beginning on the date the accused is notified that the application for review has been granted by

letter placed in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record; or

"(B) the date set by the Court of Criminal Appeals by rule or order.

"(d) DUTIES.—

"(1) In any case before the Court of Criminal Appeals under paragraph (1) of subsection (b), the Court shall affirm, set aside, or modify the findings, sentence, or order appealed.

"(2) In any case before the Court of Criminal Appeals under paragraph (2) of subsection (b), the Court shall review the record of trial and affirm, set aside, or modify the findings or sentence.

"(3) In any case before the Court of Criminal Appeals under paragraph (1) or (2) of subsection (b), the Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c).

"(e) CONSIDERATION OF THE EVIDENCE.—

"(1) In an appeal of a finding of guilty under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court of Criminal Appeals, upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused. The Court may set aside and dismiss a finding if clearly convinced that the finding was against the weight of the evidence. The Court may affirm a lesser finding. A rehearing may not be ordered.

"(2) When considering a case under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court may weigh the evidence and determine controverted questions of fact, subject to—

"(A) appropriate deference to the fact that the court-martial saw and heard the witnesses and other evidence; and

"(B) appropriate deference to findings of fact entered into the record by the military judge.

"(f) CONSIDERATION OF SENTENCE.—(1) In considering a sentence on appeal, other than as provided in section 856(e) of this title (article 56(e)), the Court of Criminal Appeals may consider—

"(A) whether the sentence violates the law;

"(B) whether the sentence is inappropriately severe—

"(i) if the sentence is for an offense for which there is no sentencing parameter under section 856(d) of this title (article 56(d)); or

"(ii) in the case of an offense with a sentencing parameter under section 856(d) of this title (article 56(d)), if the sentence is above the upper range under subsection (d)(2)(B)(iii).

"(C) in the case of a sentence for an offense with a sentencing parameter under this section, whether the sentence is a result of an incorrect application of the parameter;

"(D) whether the sentence is plainly unreasonable; and

"(E) in review of a sentence to death or to life in prison without eligibility for parole determined by the members in a capital case under section 853(d) of this title (article 53(d)), whether the sentence is otherwise appropriate, under rules prescribed by the President.

"(2) In an appeal under this subsection or section 856(e) of this title (article 56(e)), other than review under subsection (b)(2), the record on appeal shall consist of—

"(A) any portion of the record in the case that is designated as pertinent by either of the parties;

"(B) the information submitted during the sentencing proceeding; and

"(C) any information required by rule or order of the Court of Criminal Appeals.

"(g) LIMITS OF AUTHORITY.—

"(1)(A) If the Court of Criminal Appeals sets aside the findings, the Court—

"(i) may affirm any lesser included offense; and

"(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

"(B) If the Court of Criminal Appeals orders a rehearing on a charge and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charge.

"(C) If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed.

"(2) If the Court of Criminal Appeals sets aside the sentence, the Court may—

"(A) modify the sentence to a lesser sentence; or

"(B) order a rehearing.

"(3) If the Court determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial

issue, subject to such limitations as the Court may direct and under such regulations as the President may prescribe.".

(c) ACTION WHEN REHEARING IMPRACTICABLE AFTER REHEARING ORDER.—Subsection (h) of such section (article), as redesignated by subsection (b)(1), is amended—

(1) in the first sentence, by striking "convening authority" and inserting "appropriate authority"; and

(2) by striking the last sentence.

(d) SECTION HEADING.—The heading for such section (article) is amended to read as follows:

"§866. Art. 66. Courts of Criminal Appeals".

SEC. 911. REVIEW BY COURT OF APPEALS FOR THE ARMED FORCES.

(a) JAG NOTIFICATION.—Subsection (a)(2) of section 867 of title 10, United States Code (article 67 of the Uniform Code of Military Justice), is amended by inserting after "the Judge Advocate General" the following: ", after appropriate notification to the other Judge Advocates General,".

(b) BASIS FOR REVIEW.—Subsection (c) of such section (article) is amended—

(1) by inserting "(1)" after "(c)";

(2) by designating the second sentence as paragraph (2);

(3) by designating the third sentence as paragraph (3);

(4) by designating the fourth sentence as paragraph (4); and

(5) in paragraph (1), as designated by paragraph (1) of this subsection, by striking "only with respect to" and all that follows through the end of the sentence and inserting the following:

"only with respect to—

"(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

"(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.".

SEC. 912. SUPREME COURT REVIEW.

The second sentence of subsection (a) of section 867a of title 10, United States Code (article 67a of the Uniform Code of Military Justice), is amended by inserting before "Court of Appeals" the following: "United States".

SEC. 913. REVIEW BY JUDGE ADVOCATE GENERAL.

Section 869 of title 10, United States Code (article 69 of the Uniform Code of Military Justice), is amended to read as follows:

“§869. Art. 69. Review by Judge Advocate General

“(a) IN GENERAL.—Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

“(b) TIMING.—To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than one year after the date of completion of review under section 864 or 865 of this title (article 64 or 65), as the case may be. The Judge Advocate General may, for good cause shown, extend the period for submission of an application, but may not consider an application submitted more than three years after such completion date.

“(c) SCOPE.—(1)(A) In a case reviewed under section 864 or section 865(d) of this title (article 64 or 65(d)), the Judge Advocate General may set aside the findings or sentence, in whole or in part on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

“(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (Article 44).

"(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

"(D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

"(2) In a case reviewed under section 865(d) of this title (article 65(d)), review under this section is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law. If the Judge Advocate General determines that the waiver, withdrawal, or failure to file an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

"(d) COURT OF CRIMINAL APPEALS.—(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)—

"(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

"(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

"(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if—

"(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

"(B) the application is filed not later than the earlier of—

"(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

"(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

"(3) The submission of an application for review under this subsection does not constitute a proceeding before the Court of Criminal Appeals for purposes of section 870(c)(1) of this title (article 70(c)(1)).

"(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.".

SEC. 914. APPELLATE DEFENSE COUNSEL IN DEATH PENALTY CASES.

Section 870 of title 10, United States Code (article 70 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(f) To the greatest extent practicable, in any capital case, at least one defense counsel under subsection (c) shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.".

SEC. 915. AUTHORITY FOR HEARING ON VACATION OF SUSPENSION OF SENTENCE TO BE CONDUCTED BY QUALIFIED JUDGE ADVOCATE.

(a) IN GENERAL.—Subsection (a) of section 872 of title 10, United States Code (article 72) of the Uniform Code of Military Justice), is amended by inserting after the first sentence the following new sentence: "The special court-martial convening authority may detail a judge advocate, who is certified under section 827(b) of this title (article 27(b)), to conduct the hearing.".

(b) TECHNICAL AMENDMENTS.—Such section (article) is further amended—

(1) in the last sentence of subsection (a), by striking "if he so desires" and inserting "if the probationer so desires"; and

(2) in the second sentence of subsection (b)—

(A) by striking "If he" and inserting "If the officer exercising general court-martial jurisdiction"; and

(B) by striking "section 871(c) of this title (article 71(c))." and inserting "section 857 of this title (article 57))."

SEC. 916. EXTENSION OF TIME FOR PETITION FOR NEW TRIAL.

The first sentence of section 873 of title 10, United States Code (article 73 of the Uniform Code of Military Justice), is amended by striking "two years after approval by the convening authority of a court-martial sentence," and inserting "three years after the date of the entry of judgment under section 860c of this title (article 60c),".

SEC. 917. RESTORATION.

Section 875 of title 10, United States Code (article 75 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

"(d) The President shall prescribe regulations, with such limitations as the President considers appropriate, governing eligibility for pay and allowances for the period after the date on which an executed part of a court-martial sentence is set aside.".

SEC. 918. LEAVE REQUIREMENTS PENDING REVIEW OF CERTAIN COURT-MARTIAL CONVICTIONS.

Section 876a of title 10, United States Code (article 76a of the Uniform Code of Military Justice), is amended—

(1) in the first sentence, by striking ", as approved under section 860 of this title (article 60),"; and

(2) in the second sentence, by striking "on which the sentence is approved under section 860 of this title (article 60)" and inserting "of the entry of judgment under section 860c of this title (article 60c)".

TITLE X—PUNITIVE ARTICLES

SEC. 1001. REORGANIZATION OF PUNITIVE ARTICLES.

Sections of subchapter X of chapter 47 of title 10, United States Code (articles of the Uniform Code of Military Justice), are transferred within subchapter X and redesignated as follows:

(1) ENLISTMENT AND SEPARATION.—Sections 883 and 884 (articles 83 and 84) are transferred so as to appear (in that order) after section 904 (article 104) and are redesignated as sections 904a and 904b (articles 104a and 104b), respectively.

(2) RESISTANCE, FLIGHT, BREACH OF ARREST, AND ESCAPE.—Section 895 (article 95) is transferred so as to appear after section 887 (article 87) and is redesignated as section 887a (article 87a).

(3) NONCOMPLIANCE WITH PROCEDURAL RULES.—Section 898 (article 98) is transferred so as to appear after section 931 (article 131) and is redesignated as section 931f (article 131f).

(4) CAPTURED OR ABANDONED PROPERTY.—Section 903 (article 103) is transferred so as to appear after section 908 (article 108) and is redesignated as section 908a (article 108a).

(5) AIDING THE ENEMY.—Section 904 (article 104) is redesignated as section 903b (article 103b).

(6) MISCONDUCT AS PRISONER.—Section 905 (article 105) is transferred so as to appear after section 897 (article 97) and is redesignated as section 898 (article 98).

(7) SPIES; ESPIONAGE.—Sections 906 and 906a (articles 106 and 106a) are transferred so as to appear (in that order) after section 902 (article 102) and are redesignated as sections 903 and 903a (articles 103 and 103a), respectively.

(8) MISBEHAVIOR OF SENTINEL.—Section 913 (article 113) is transferred so as to appear after section 894 (article 94) and is redesignated as section 895 (article 95).

(9) DRUNKEN OR RECKLESS OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL.—Section 911 (article 111) is transferred so as to appear after section 912a (article 912a) and is redesignated as section 913 (article 113).

(10) HOUSEBREAKING.—Section 930 (article 130) is redesignated as section 929a (article 129a).

(11) STALKING.—Section 920a (article 120a) is transferred so as to appear after section 929a (article 129a), as redesignated by paragraph (10), and is redesignated as section 930 (article 130).

(12) FORGERY.—Section 923 (article 123) is transferred so as to appear after section 904b (article 104b), as transferred and redesignated by paragraph (1), and is redesignated as section 905 (article 105).

(13) MAIMING.—Section 924 (article 124) is transferred so as to appear after section 928 (article 128) and is redesignated as section 928a (article 128a).

(14) FRAUDS AGAINST THE UNITED STATES.—Section 932 of (article 132) is transferred so as to appear after section 923a (article 123a) and is redesignated as section 924 (article 124).

SEC. 1002. CONVICTION OF OFFENSE CHARGED, LESSER INCLUDED OFFENSES, AND ATTEMPTS.

Section 879 of title 10, United States Code (article 79 of the Uniform Code of Military Justice), is amended to read as follows:

"**§879. Art. 79. Conviction of offense charged, lesser included offenses, and attempts**

"(a) IN GENERAL.—An accused may be found guilty of any of the following:

"(1) The offense charged.

"(2) A lesser included offense.

"(3) An attempt to commit the offense charged.

"(4) An attempt to commit a lesser included offense, if the attempt is an offense in its own right.

"(b) DEFINITION.—In this section (article), the term 'lesser included offense' means—

"(1) an offense that is necessarily included in the offense charged; and

"(2) any lesser included offense so designated by regulation prescribed by the President.

"(c) REGULATORY AUTHORITY.—Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense.".

SEC. 1003. SOLICITING COMMISSION OF OFFENSES.

Section 882 of title 10, United States Code (article 82 of the Uniform Code of Military Justice), is amended to read as follows:

"§882. Art. 82. Soliciting commission of offenses

"(a) SOLICITING COMMISSION OF OFFENSES GENERALLY.—Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct.

"(b) SOLICITING DESERTION, MUTINY, SEDITION, OR MISBEHAVIOR BEFORE THE ENEMY.—Any person subject to this chapter who solicits or advises another to violate section 885 of this title (article 85), section 894 of this title (article 94), or section 99 of this title (article 99)—

"(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and

"(2) if the offense solicited or advised is not attempted or committed, shall be punished as a court-martial may direct.".

SEC. 1004. MALINGERING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 882 (article 82 of the Uniform Code of Military Justice), as amended by section 1003, the following new section (article):

"§883. Art. 83. Malingering

"Any person subject to this chapter who, with the intent to avoid work, duty, or service—

"(1) feigns illness, physical disablement, mental lapse, or mental derangement; or

"(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.".

SEC. 1005. BREACH OF MEDICAL QUARANTINE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 883 (article 83 of the Uniform Code of Military Justice), as added by section 1004, the following new section (article):

"§884. Art. 84. Breach of medical quarantine

"Any person subject to this chapter—

"(1) who is ordered into medical quarantine by a person authorized to issue such order; and

"(2) who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority;

shall be punished as a court-martial may direct.".

SEC. 1006. MISSING MOVEMENT; JUMPING FROM VESSEL.

Section 887 of title 10, United States Code (article 87 of the Uniform Code of Military Justice), is amended to read as follows:

"§887. Art. 87. Missing movement; jumping from vessel

"(a) MISSING MOVEMENT.—Any person subject to this chapter who, through neglect or design, misses the movement of a ship, aircraft, or unit with which the person is required in the course of duty to move shall be punished as a court-martial may direct.

"(b) JUMPING FROM VESSEL INTO THE WATER.—Any person subject to this chapter who wrongfully and intentionally jumps into the water from a vessel in use by the armed forces shall be punished as a court-martial may direct.".

SEC. 1007. OFFENSES AGAINST CORRECTIONAL CUSTODY AND RESTRICTION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 887a (article 87a of the Uniform Code of Military Justice),

as transferred and redesignated by section 1001(2), the following new section (article):

"§887b. Art. 87b. Offenses against correctional custody and restriction

"(a) ESCAPE FROM CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under physical restraint; and

"(3) who escapes from the physical restraint before being released from the physical restraint by proper authority;

shall be punished as a court-martial may direct.

"(b) BREACH OF CORRECTIONAL CUSTODY.—Any person subject to this chapter—

"(1) who is placed in correctional custody by a person authorized to do so;

"(2) who, while in correctional custody, is under restraint other than physical restraint; and

"(3) who goes beyond the limits of the restraint before being released from the correctional custody or relieved of the restraint by proper authority;

shall be punished as a court-martial may direct.

"(c) BREACH OF RESTRICTION.—Any person subject to this chapter—

"(1) who is ordered to be restricted to certain limits by a person authorized to do so; and

"(2) who, with knowledge of the limits of the restriction, goes beyond those limits before being released by proper authority;

shall be punished as a court-martial may direct.".

SEC. 1008. DISRESPECT TOWARD SUPERIOR COMMISSIONED OFFICER; ASSAULT OF SUPERIOR COMMISSIONED OFFICER.

Section 889 of title 10, United States Code (article 89 of the Uniform Code of Military Justice), is amended to read as follows:

"§889. Art. 89. Disrespect toward superior commissioned officer; assault of superior commissioned officer

"(a) DISRESPECT.—Any person subject to this chapter who behaves with disrespect toward that person's superior commissioned officer shall be punished as a court-martial may direct.

"(b) ASSAULT.—Any person subject to this chapter who strikes that person's superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer's office shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

SEC. 1009. WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER.

Section 890 of title 10, United States Code (article 90 of the Uniform Code of Military Justice), is amended to read as follows:

"§890. Art. 90. Willfully disobeying superior commissioned officer

"Any person subject to this chapter who willfully disobeys a lawful command of that person's superior commissioned officer shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.".

SEC. 1010. PROHIBITED ACTIVITIES WITH MILITARY RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 893 (article 93 of the Uniform Code of Military Justice), the following new section (article):

"**§893a. Art. 93a. Prohibited activities with military recruit or trainee by person in position of special trust**

"(a) ABUSE OF TRAINING LEADERSHIP POSITION.—Any person subject to this chapter—

"(1) who is an officer, a noncommissioned officer, or a petty officer;

"(2) who is in a training leadership position with respect to a specially protected junior member of the armed forces; and

"(3) who engages in prohibited sexual activity with such specially protected junior member of the armed forces;

shall be punished as a court-martial may direct.

"(b) ABUSE OF POSITION AS MILITARY RECRUITER.—Any person subject to this chapter—

"(1) who is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or

"(2) who is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the armed forces who is enlisted under a delayed entry program;

shall be punished as a court-martial may direct.

"(c) CONSENT.—Consent is not a defense for any conduct at issue in a prosecution under this section (article).

"(d) DEFINITIONS.—In this section (article):

"(1) SPECIALLY PROTECTED JUNIOR MEMBER OF THE ARMED FORCES.—The term 'specially protected junior member of the armed forces' means—

"(A) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

"(B) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

"(C) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

"(2) TRAINING LEADERSHIP POSITION.—The term 'training leadership position' means, with respect to a specially protected junior member of the armed forces, any of the following:

"(A) Any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the

Secretary concerned, is identified as a training program for initial career qualification.

"(B) Faculty and staff of the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

"(3) APPLICANT FOR MILITARY SERVICE.—The term 'applicant for military service' means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.

"(4) PROHIBITED SEXUAL ACTIVITY.—The term 'prohibited sexual activity' means, as specified in regulations prescribed by the Secretary concerned, inappropriate physical intimacy under circumstances described in such regulations.".

SEC. 1011. OFFENSES BY SENTINEL OR LOOKOUT.

Section 895 of title 10, United States Code (article 95 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(8), is amended to read as follows:

"§895. Art. 95. Offenses by sentinel or lookout

"(a) DRUNK OR SLEEPING ON POST, OR LEAVING POST BEFORE BEING RELIEVED.—Any sentinel or lookout who is drunk on post, who sleeps on post, or who leaves post before being regularly relieved, shall be punished—

"(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

"(2) if the offense is committed other than in time of war, by such punishment, other than death, as a court-martial may direct.

"(b) LOITERING OR WRONGFULLY SITTING ON POST.—Any sentinel or lookout who loiters or wrongfully sits down on post shall be punished as a court-martial may direct.".

SEC. 1012. DISRESPECT TOWARD SENTINEL OR LOOKOUT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 895 (article 95 of the Uniform Code of Military Justice), as amended by section 1011, the following new section (article):

"§895a. Art. 95a. Disrespect toward sentinel or lookout

"(a) DISRESPECTFUL LANGUAGE TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, uses wrongful and disrespectful language that is directed toward and within the hearing of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.

"(b) DISRESPECTFUL BEHAVIOR TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, behaves in a wrongful and disrespectful manner that is directed toward and within the sight of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.".

SEC. 1013. RELEASE OF PRISONER WITHOUT AUTHORITY; DRINKING WITH PRISONER.

Section 896 of title 10, United States Code (article 96 of the Uniform Code of Military Justice), is amended to read as follows:

"§896. Art. 96. Release of prisoner without authority; drinking with prisoner

"(a) RELEASE OF PRISONER WITHOUT AUTHORITY.—Any person subject to this chapter—

"(1) who, without authority to do so, releases a prisoner; or

"(2) who, through neglect or design, allows a prisoner to escape;

shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with the law.

"(b) DRINKING WITH PRISONER.—Any person subject to this chapter who unlawfully drinks any alcoholic beverage with a prisoner shall be punished as a court-martial may direct.".

SEC. 1014. PENALTY FOR ACTING AS A SPY.

Section 903 of title 10, United States Code (article 103 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(7), is amended by inserting before the period at the end of the first sentence the following: "or such other punishment as a court-martial or a military commission may direct".

SEC. 1015. PUBLIC RECORDS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 903b (article 103b of the Uniform Code of Military Justice), as redesignated by section 1001(5), the following new section (article):

"§904. Art. 104. Public records offenses

"Any person subject to this chapter who, willfully and unlawfully—

"(1) alters, conceals, removes, mutilates, obliterates, or destroys a public record; or

"(2) takes a public record with the intent to alter, conceal, remove, mutilate, obliterate, or destroy the public record;

shall be punished as a court-martial may direct.".

SEC. 1016. FALSE OR UNAUTHORIZED PASS OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905 (article 105 of the Uniform Code of Military Justice), as

transferred and redesignated by section 1001(12), the following new section (article):

"§905a. Art. 105a. False or unauthorized pass offenses

"(a) WRONGFUL MAKING, ALTERING, ETC.—Any person subject to this chapter who, wrongfully and falsely, makes, alters, counterfeits, or tampers with a military or official pass, permit, discharge certificate, or identification card shall be punished as a court-martial may direct.

"(b) WRONGFUL SALE, ETC.—Any person subject to this chapter who wrongfully sells, gives, lends, or disposes of a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

"(c) WRONGFUL USE OR POSSESSION.—Any person subject to this chapter who wrongfully uses or possesses a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.".

SEC. 1017. IMPERSONATION OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 905a (article 105a of the Uniform Code of Military Justice), as added by section 1016, the following new section (article):

"§906. Art. 106. Impersonation of officer, noncommissioned or petty officer, or agent or official

"(a) IN GENERAL.—Any person subject to this chapter who, wrongfully and willfully, impersonates—

"(1) an officer, a noncommissioned officer, or a petty officer;

"(2) an agent of superior authority of one of the armed forces; or

"(3) an official of a government;

shall be punished as a court-martial may direct.

"(b) IMPERSONATION WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and with intent to defraud, impersonates any person referred to in paragraph (1), (2), or (3) of subsection (a) shall be punished as a court-martial may direct.

"(c) IMPERSONATION OF GOVERNMENT OFFICIAL WITHOUT INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and without intent to defraud, impersonates an official of a government by committing

an act that exercises or asserts the authority of the office that the person claims to have shall be punished as a court-martial may direct.".

SEC. 1018. INSIGNIA OFFENSES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 906 (article 106 of the Uniform Code of Military Justice), as added by section 1017, the following new section (article):

"§906a. Art. 106a. Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

"Any person subject to this chapter—

"(1) who is not authorized to wear an insignia, decoration, badge, ribbon, device, or lapel button; and

"(2) who wrongfully wears such insignia, decoration, badge, ribbon, device, or lapel button upon the person's uniform or civilian clothing;

shall be punished as a court-martial may direct.".

SEC. 1019. FALSE OFFICIAL STATEMENTS; FALSE SWEARING.

Section 907 of title 10, United States Code (article 107 of the Uniform Code of Military Justice), is amended to read as follows:

"§907. Art. 107. False official statements; false swearing

"(a) FALSE OFFICIAL STATEMENTS.—Any person subject to this chapter who, with intent to deceive—

"(1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or

"(2) makes any other false official statement knowing it to be false;

shall be punished as a court-martial may direct.

"(b) FALSE SWEARING.—Any person subject to this chapter—

"(1) who takes an oath that—

"(A) is administered in a matter in which such oath is required or authorized by law; and

"(B) is administered by a person with authority to do so; and

"(2) who, upon such oath, makes or subscribes to a statement;

if the statement is false and at the time of taking the oath, the person does not believe the statement to be true, shall be punished as a court-martial may direct.".

SEC. 1020. PAROLE VIOLATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 907 (article 107 of the Uniform Code of Military Justice), as amended by section 1019, the following new section (article):

"§907a. Art. 107a. Parole violation

"Any person subject to this chapter—

"(1) who, having been a prisoner as the result of a court-martial conviction or other criminal proceeding, is on parole with conditions; and

"(2) who violates the conditions of parole;

shall be punished as a court-martial may direct.".

SEC. 1021. WRONGFUL TAKING, OPENING, ETC. OF MAIL MATTER

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 909 (article 109 of the Uniform Code of Military Justice), the following new section (article):

"§909a. Art. 109a. Mail matter: wrongful taking, opening, etc.

"(a) TAKING.—Any person subject to this chapter who, with the intent to obstruct the correspondence of, or to pry into the business or secrets of, any person or organization, wrongfully takes mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

"(b) OPENING, SECRETING, DESTROYING, STEALING.—Any person subject to this chapter who wrongfully opens, secretes, destroys, or steals mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.".

SEC. 1022. IMPROPER HAZARDING OF VESSEL OR AIRCRAFT.

Section 910 of title 10, United States Code (article 110 of the Uniform Code of Military Justice), is amended to read as follows:

“§910. Art. 110. Improper hazarding of vessel or aircraft

“(a) WILLFUL AND WRONGFUL HAZARDING.—Any person subject to this chapter who, willfully and wrongfully, hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished by death or such other punishment as a court-martial may direct.

“(b) NEGLIGENT HAZARDING.—Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished as a court-martial may direct.”.

SEC. 1023. LEAVING SCENE OF VEHICLE ACCIDENT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 910 (article 110 of the Uniform Code of Military Justice), as amended by section 1022, the following new section (article):

“§911. Art. 111. Leaving scene of vehicle accident

“(a) DRIVER.—Any person subject to this chapter—

“(1) who is the driver of a vehicle that is involved in an accident that results in personal injury or property damage; and

“(2) who wrongfully leaves the scene of the accident—

“(A) without providing assistance to an injured person; or

“(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.

"(b) SENIOR PASSENGER.—Any person subject to this chapter—

"(1) who is a passenger in a vehicle that is involved in an accident that results in personal injury or property damage;

"(2) who is the superior commissioned or noncommissioned officer of the driver of the vehicle or is the commander of the vehicle; and

"(3) who wrongfully and unlawfully orders, causes, or permits the driver to leave the scene of the accident—

"(A) without providing assistance to an injured person; or

"(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.".

SEC. 1024. DRUNKENNESS AND OTHER INCAPACITATION OFFENSES.

Section 912 of title 10, United States Code (article 112 of the Uniform Code of Military Justice), is amended to read as follows:

"§912. Art. 112. Drunkenness and other incapacitation offenses

"(a) DRUNK ON DUTY.—Any person subject to this chapter who is drunk on duty shall be punished as a court-martial may direct.

"(b) INCAPACITATION FOR DUTY FROM DRUNKENNESS OR DRUG USE.—Any person subject to this chapter who, as a result of indulgence in any alcoholic beverage or any drug, is incapacitated for the proper performance of duty shall be punished as a court-martial may direct.

"(c) DRUNK PRISONER.—Any person subject to this chapter who is a prisoner and, while in such status, is drunk shall be punished as a court-martial may direct.".

SEC. 1025. LOWER BLOOD ALCOHOL CONTENT LIMITS FOR CONVICTION OF DRUNKEN OR RECKLESS OPERATION OF VEHICLE, AIRCRAFT, OR VESSEL.

Subsection (b)(3) of section 913 of title 10, United States Code (article 113 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(9), is amended—

(1) by striking "0.10 grams" both places it appears and inserting "0.08 grams"; and

(2) by adding at the end the following new sentence: "The Secretary may by regulation prescribe limits that are lower than the limits specified in the preceding sentence, if such lower limits are based on scientific developments, as reflected in Federal law of general applicability.".

SEC. 1026. ENDANGERMENT OFFENSES.

Section 914 of title 10, United States Code (article 114 of the Uniform Code of Military Justice), is amended to read as follows:

"§914. Art. 114. Endangerment offenses

"(a) RECKLESS ENDANGERMENT.—Any person subject to this chapter who engages in conduct that—

"(1) is wrongful and reckless or is wanton; and

"(2) is likely to produce death or grievous bodily harm to another person;

shall be punished as a court-martial may direct.

"(b) DUELING.—Any person subject to this chapter—

"(1) who fights or promotes, or is concerned in or connives at fighting a duel; or

"(2) who, having knowledge of a challenge sent or about to be sent, fails to report the facts promptly to the proper authority;

shall be punished as a court-martial may direct.

"(c) FIREARM DISCHARGE, ENDANGERING HUMAN LIFE.—Any person subject to this chapter who, willfully and wrongly, discharges a firearm, under circumstances such as to endanger human life shall be punished as a court-martial may direct.

"(d) CARRYING CONCEALED WEAPON.—Any person subject to this chapter who unlawfully carries a dangerous weapon concealed on or about his person shall be punished as a court-martial may direct.".

SEC. 1027. COMMUNICATING THREATS.

Section 915 of title 10, United States Code (article 115 of the Uniform Code of Military Justice), is amended to read as follows:

"§915. Art. 115. Communicating threats

"(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct.

"(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injure the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct.

"(c) COMMUNICATING FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-

martial may direct. As used in the preceding sentence, the term 'false threat' means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.".

SEC. 1028. TECHNICAL AMENDMENT RELATING TO MURDER.

Section 918(4) of title 10, United States Code (article 118(4) of the Uniform Code of Military Justice), is amended by striking "forcible sodomy,".

SEC. 1029. CHILD ENDANGERMENT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 919a (article 119a of the Uniform Code of Military Justice), the following new section (article):

"§919b. Art. 119b. Child endangerment

"Any person subject to this chapter—

"(1) who has a duty for the care of a child under the age of 16 years; and

"(2) who, through design or culpable negligence, endangers the child's mental or physical health, safety, or welfare;

shall be punished as a court-martial may direct.".

SEC. 1030. DEFINITION OF SEXUAL ACT FOR RAPE AND SEXUAL ASSAULT OFFENSES.

(a) RAPE AND SEXUAL ASSAULT GENERALLY.—Paragraph (1) of section 920(g) of title 10, United States Code (article 120(g) of the Uniform Code of Military Justice), is amended to read as follows:

"(1) SEXUAL ACT.—The term 'sexual act' means—

"(A) contact between the penis and the vulva or the penis and the anus, and for purpose of this subparagraph contact involving the penis occurs upon penetration, however slight;

"(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

"(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.".

(b) RAPE AND SEXUAL ASSAULT OF A CHILD.—Section 920b of title 10, United States Code (article 120b of the Uniform Code of Military Justice), is amended in subsection (h)(1) by inserting before the period at the end the following:

", except that the term 'sexual act' also includes the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person".

SEC. 1031. DEPOSIT OF OBSCENE MATTER IN THE MAIL.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 920 (article 120 of the Uniform Code of Military Justice), the following new section (article):

"§920a. Art. 120a. Mails: deposit of obscene matter

"Any person subject to this chapter who, wrongfully and knowingly, deposits obscene matter for mailing and delivery shall be punished as a court-martial may direct.".

SEC. 1032. FRAUDULENT USE OF CREDIT CARDS, DEBIT CARDS, AND OTHER ACCESS DEVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921 (article 121 of the Uniform Code of Military Justice), the following new section (article):

"§921a. Art. 121a. Fraudulent use of credit cards, debit cards, and other access devices

"(a) IN GENERAL.—Any person subject to this chapter who, with intent to defraud, uses—

"(1) a stolen credit card, debit card, or other access device;

"(2) a revoked, cancelled, or otherwise invalid credit card, debit card, or other access device; or

"(3) a credit card, debit card, or other access device without the authorization of a person whose authorization is required for such use;

to obtain money, property, services, or anything else of value shall be punished as a court-martial may direct.

"(b) DEFINITION.—In this section (article), the term 'access device' has the meaning given that term in section 1029 of title 18.".

SEC. 1033. FALSE PRETENSES TO OBTAIN SERVICES.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 921a (article 121a of the Uniform Code of Military Justice), as added by section 1032, the following new section (article):

"§921b. Art. 121b. False pretenses to obtain services

"Any person subject to this chapter who, with intent to defraud, knowingly uses false pretenses to obtain services shall be punished as a court-martial may direct.".

SEC. 1034. ROBBERY.

Section 922 of title 10, United States Code (article 122 of the Uniform Code of Military Justice), is amended to read as follows:

"§922. Art. 122. Robbery

"Any person subject to this chapter who takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.".

SEC. 1035. RECEIVING STOLEN PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922 (article 122 of the Uniform Code of Military Justice), as amended by section 1034, the following new section (article):

“§922a. Art. 122a. Receiving stolen property

“Any person subject to this chapter who wrongfully receives, buys, or conceals stolen property, knowing the property to be stolen property, shall be punished as a court-martial may direct.”.

SEC. 1036. OFFENSES CONCERNING GOVERNMENT COMPUTERS.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 922a (article 122a of the Uniform Code of Military Justice), as added by section 1035, the following new section (article):

“§923. Art. 123. Offenses concerning Government computers

“(a) IN GENERAL.—Any person subject to this chapter who—

“(1) knowingly accesses a Government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe such information could be used to the injury of the United States, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted such information to any person not entitled to receive it;

“(2) intentionally accesses a Government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any such Government computer; or

"(3) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a Government computer;

shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'computer' has the meaning given that term in section 1030 of title 18.

"(2) The term 'Government computer' means a computer owned or operated by or on behalf of the United States Government.

"(3) The term 'damage' has the meaning given that term in section 1030 of title 18.".

SEC. 1037. BRIBERY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924 (article 124 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(14), the following new section (article):

"§924a. Art. 124a. Bribery

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value with the intent to have the person's decision or action influenced with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, with the intent to influence the decision or action of the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

SEC. 1038. GRAFT.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 924a (article 124a of the Uniform Code of Military Justice), as added by section 1037, the following new section (article):

"§924b. Art. 124b. Graft

"(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

"(1) who occupies an official position or who has official duties; and

"(2) who wrongfully asks, accepts, or receives a thing of value as compensation for or in recognition of services rendered or to be rendered by

the person with respect to an official matter in which the United States is interested;

shall be punished as a court-martial may direct.

"(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, as compensation for or in recognition of services rendered or to be rendered by the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.".

SEC. 1039. KIDNAPPING.

Section 925 of title 10, United States Code (article 125 of the Uniform Code of Military Justice), is amended to read as follows:

"§925. Art. 125. Kidnapping

"Any person subject to this chapter who wrongfully—

"(1) seizes, confines, inveigles, decoys, or carries away another person; and

"(2) holds the other person against that person's will;

shall be punished as a court-martial may direct.".

SEC. 1040. ARSON; BURNING PROPERTY WITH INTENT TO DEFRAUD.

Section 926 of title 10, United States Code (article 126 of the Uniform Code of Military Justice), is amended to read as follows:

"§926. Art. 126. Arson; burning property with intent to defraud

"(a) AGGRAVATED ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein, to the knowledge of that person, there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

"(b) SIMPLE ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets fire to the property of another is guilty of simple arson and shall be punished as a court-martial may direct.

"(c) BURNING PROPERTY WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, willfully, maliciously, and with intent to defraud, burns or sets fire to any property shall be punished as a court-martial may direct.".

SEC. 1041. ASSAULT.

Section 928 of title 10, United States Code (article 128 of the Uniform Code of Military Justice), is amended to read as follows:

"§928. Art. 128. Assault

"(a) ASSAULT.—Any person subject to this chapter who, unlawfully and with force or violence—

"(1) attempts to do bodily harm to another person;

"(2) offers to do bodily harm to another person; or

"(3) does bodily harm to another person;

is guilty of assault and shall be punished as a court-martial may direct.

"(b) AGGRAVATED ASSAULT.—Any person subject to this chapter—

"(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or

"(2) who, in committing an assault, inflicts substantial bodily harm, or grievous bodily harm on another person;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

"(c) ASSAULT WITH INTENT TO COMMIT SPECIFIED OFFENSES.—

"(1) IN GENERAL.—Any person subject to this chapter who commits assault with intent to commit an offense specified in paragraph (2) shall be punished as a court-martial may direct.

"(2) OFFENSES SPECIFIED.—The offenses referred to in paragraph (1) are murder, voluntary manslaughter, rape, sexual assault, rape of a child, sexual assault of a child, robbery, arson, burglary, and kidnapping.".

SEC. 1042. BURGLARY AND UNLAWFUL ENTRY.

Section 929 of title 10, United States Code (article 129 of the Uniform Code of Military Justice), and section 929a of such title (article 129a), as redesignated by section 1001(10), are amended to read as follows:

"§929. Art. 129. Burglary; unlawful entry

"(a) BURGLARY.—Any person subject to this chapter who, with intent to commit an offense under this chapter, breaks and enters the building or structure of another shall be punished as a court-martial may direct.

"(b) UNLAWFUL ENTRY.—Any person subject to this chapter who unlawfully enters—

"(1) the real property of another; or

"(2) the personal property of another which amounts to a structure usually used for habitation or storage;

shall be punished as a court-martial may direct.".

SEC. 1043. STALKING.

Section 930 of title 10, United States Code (article 130 of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(11), is amended to read as follows:

"930. Art. 130. Stalking

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

"(2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

"(3) whose conduct induces reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

is guilty of stalking and shall be punished as a court-martial may direct.

"(b) DEFINITIONS.—In this section:

"(1) The term 'conduct' means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

"(2) The term 'course of conduct' means—

"(A) a repeated maintenance of visual or physical proximity to a specific person;

"(B) a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or toward a specific person; or

"(C) a pattern of conduct composed of repeated acts evidencing a continuity of purpose.

"(3) The term 'repeated', with respect to conduct, means two or more occasions of such conduct.

"(4) The term 'immediate family', in the case of a specific person, means—

"(A) that person's spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

"(B) any other person living in his or her household and related to him or her by blood or marriage.

"(5) The term 'intimate partner' in the case of a specific person, means—

"(A) a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or

"(B) a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.".

SEC. 1044. SUBORNATION OF PERJURY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931 (article 131 of the Uniform Code of Military Justice), the following new section (article):

"§931a. Art. 131a. Subornation of perjury

"(a) IN GENERAL.—Any person subject to this chapter who induces and procures another person—

"(1) to take an oath; and

"(2) to falsely testify, depose, or state upon such oath;

shall, if the conditions specified in subsection (b) are satisfied, be punished as a court-martial may direct.

"(b) CONDITIONS.—The conditions referred to in subsection (a) are the following:

"(1) The oath is administered with respect to a matter for which such oath is required or authorized by law.

"(2) The oath is administered by a person having authority to do so.

"(3) Upon the oath, the other person willfully makes or subscribes a statement.

"(4) The statement is material.

"(5) The statement is false.

"(6) When the statement is made or subscribed, the person subject to this chapter and the other person do not believe that the statement is true.".

SEC. 1045. OBSTRUCTING JUSTICE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931a (article 131a of the Uniform Code of Military Justice), as added by section 1044, the following new section (article):

"§931b. Art. 131b. Obstructing justice

"Any person subject to this chapter who engages in conduct in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending, with intent to influence, impede, or otherwise obstruct the due administration of justice shall be punished as a court-martial may direct.".

SEC. 1046. MISPRISION OF SERIOUS OFFENSE.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931b (article 131b of the Uniform Code of Military Justice), as added by section 1045, the following new section (article):

"§931c. Art. 131c. Misprision of serious offense

"(a) IN GENERAL.—Any person subject to this chapter—

"(1) who knows that another person has committed a serious offense; and

"(2) wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible;

shall be punished as a court-martial may direct.".

SEC. 1047. WRONGFUL REFUSAL TO TESTIFY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931c (article 131c of the Uniform Code of Military Justice), as added by section 1046, the following new section (article):

"§931d. Art. 131d. Wrongful refusal to testify

"Any person subject to this chapter who, in the presence of a court-martial, a board of officers, a military commission, a court of inquiry, preliminary hearing, or an officer taking a deposition, of or for the United States, wrongfully refuses to

qualify as a witness or to answer a question after having been directed to do so by the person presiding shall be punished as a court-martial may direct.”.

SEC. 1048. PREVENTION OF AUTHORIZED SEIZURE OF PROPERTY.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931d (article 131d of the Uniform Code of Military Justice), as added by section 1047, the following new section (article):

“§931e. Art. 131e. Prevention of authorized seizure of property

“Any person subject to this chapter who, knowing that one or more persons authorized to make searches and seizures are seizing, are about to seize, or are endeavoring to seize property, destroys, removes, or otherwise disposes of the property with intent to prevent the seizure thereof shall be punished as a court-martial may direct.”.

SEC. 1049. WRONGFUL INTERFERENCE WITH ADVERSE ADMINISTRATIVE PROCEEDING.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931f (article 131f of the Uniform Code of Military Justice), as transferred and redesignated by section 1001(3), the following new section (article):

"§931g. Art. 131g. Wrongful interference with adverse administrative proceeding

"Any person subject to this chapter who, having reason to believe that an adverse administrative proceeding is pending against any person subject to this chapter, wrongfully acts with the intent—

"(1) to influence, impede, or obstruct the conduct of the proceeding; or

"(2) otherwise to obstruct the due administration of justice;

shall be punished as a court-martial may direct.".

SEC. 1050. RETALIATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931g (article 131g of the Uniform Code of Military Justice), as added by section 1049, the following new section (article):

"§932. Art. 132. Retaliation

"Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or with the intent to discourage any person from reporting a criminal offense—

"(1) wrongfully takes or threatens to take an adverse personnel action against any person; or

"(2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person;

shall be punished as a court-martial may direct.".

SEC. 1051. EXTRATERRITORIAL APPLICATION OF CERTAIN OFFENSES.

Section 934 of title 10, United States Code (article 134 of the Uniform Code of Military Justice), is amended by adding at the end the following new sentence: "As used in the preceding sentence, the term 'crimes and offenses not capital' includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.".

SEC. 1052. TABLE OF SECTIONS.

The table of sections at the beginning of subchapter X of chapter 47 of title 10, United States Code, is amended to read as follows:

"SUBCHAPTER X—PUNITIVE ARTICLES

"Sec.	Art.	
"877.	77.	Principals.
"878.	78.	Accessory after the fact.
"879.	79.	Conviction of offense charged, lesser included offenses, and attempts.
"880.	80.	Attempts.
"881.	81.	Conspiracy.
"882.	82.	Soliciting commission of offenses.

“883.	83.	Malingering.
“884.	84.	Breach of medical quarantine.
“885.	85.	Desertion.
“886.	86.	Absence without leave.
“887.	87.	Missing movement; jumping from vessel.
“887a.	87a.	Resistance, flight, breach of arrest, and escape.
“887b.	87b.	Offenses against correctional custody and restriction.
“888.	88.	Contempt toward officials.
“889.	89.	Disrespect toward superior commissioned officer; assault of superior commissioned officer.
“890.	90.	Willfully disobeying superior commissioned officer.
“891.	91.	Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer.
“892.	92.	Failure to obey order or regulation.
“893.	93.	Cruelty and maltreatment.
“893a.	93a.	Prohibited activities with military recruit or trainee by person in position of special trust.
“894.	94.	Mutiny or sedition.
“895.	95.	Offenses by sentinel or lookout.
“895a.	95a.	Disrespect toward sentinel or lookout.
“896.	96.	Release of prisoner without authority; drinking with prisoner.
“897.	97.	Unlawful detention.
“898.	98.	Misconduct as prisoner.
“899.	99.	Misbehavior before the enemy.
“900.	100.	Subordinate compelling surrender.
“901.	101.	Improper use of countersign.
“902.	102.	Forcing a safeguard.
“903.	103.	Spies.
“903a.	103a.	Espionage.
“903b.	103b.	Aiding the enemy.
“904.	104.	Public records offenses.
“904a.	104a.	Fraudulent enlistment, appointment, or separation.
“904b.	104b.	Unlawful enlistment, appointment, or

		separation.
“905.	105.	Forgery.
“905a.	105a.	False or unauthorized pass offenses.
“906.	106.	Impersonation of officer, noncommissioned or petty officer, or agent or official
“906a.	106a.	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button.
“907.	107.	False official statements; false swearing.
“907a.	107a.	Parole violation.
“908	108	Military property of United States—Loss, damage, destruction, or wrongful, disposition.
“908a.	108a.	Captured or abandoned property.
“909.	109.	Property other than military property of United States—Waste, spoilage, or destruction.
“909a.	109a.	Mail matter: wrongful taking, opening, etc.
“910.	110.	Improper hazarding of vessel or aircraft.
“911.	111.	Leaving scene of vehicle accident.
“912.	112.	Drunkenness and other incapacitation offenses.
“912a.	112a.	Wrongful use, possession, etc., of controlled substances.
“913.	113.	Drunken or reckless operation of vehicle, aircraft, or vessel.
“914.	114.	Endangerment offenses.
“915.	115.	Communicating threats.
“916.	116.	Riot or breach of peace.
“917.	117.	Provoking speeches or gestures.
“918.	118.	Murder.
“919.	119.	Manslaughter.
“919a.	119a.	Death or injury of an unborn child.
“919b.	119b.	Child endangerment.
“920.	120.	Rape and sexual assault generally.
“920a.	120a.	Mails: deposit of obscene matter.
“920b.	120b.	Rape and sexual assault of a child.
“920c.	120c.	Other sexual misconduct.
“921.	121.	Larceny and wrongful appropriation.
“921a.	121a.	Fraudulent use of credit cards, debit cards, and other access devices.
“921b.	121b.	False pretenses to obtain services.
“922.	122.	Robbery.

"922a.	122a.	Receiving stolen property.
"923.	123.	Offenses concerning Government computers.
"923a.	123a.	Making, drawing, or uttering check, draft, or order without sufficient funds.
"924.	124.	Frauds against the United States.
"924a.	124a.	Bribery.
"924b.	124b.	Graft.
"925.	125.	Kidnapping.
"926.	126.	Arson; burning property with intent to defraud.
"927.	127.	Extortion.
"928.	128.	Assault.
"928a.	128a.	Maiming.
"929.	129.	Burglary; unlawful entry.
"930.	130.	Stalking.
"931.	131.	Perjury.
"931a.	131a.	Subornation of perjury.
"931b.	131b.	Obstructing justice.
"931c.	131c.	Misprision of serious offense.
"931d.	131d.	Wrongful refusal to testify.
"931e.	131e.	Prevention of authorized seizure of property.
"931f.	131f.	Noncompliance with procedural rules.
"931g.	131g.	Wrongful interference with adverse administrative proceeding.
"932.	132.	Retaliation.
"933.	133.	Conduct unbecoming an officer and a gentleman.
"934.	134.	General article.".

TITLE XI—MISCELLANEOUS PROVISIONS

SEC. 1101. TECHNICAL AMENDMENT RELATING TO COURTS OF INQUIRY.

Section 935(c) of title 10, United States Code (article 135(c) of the Uniform Code of Military Justice), is amended—

(1) by striking "(c) Any person" and inserting "(c)(1) Any person";

(2) by designating the second and third sentences as paragraphs (2) and (3), respectively; and

(3) in paragraph (2), as so designated, by striking "subject to this chapter or employed by the Department of Defense" and inserting "who is (A) subject to this chapter, (B) employed by the Department of Defense, or (C) employed by the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, and".

SEC. 1102. TECHNICAL AMENDMENT TO ARTICLE 136.

Section 936 of title 10, United States Code (article 136 of the Uniform Code of Military Justice), is amended by striking the last five words in the section heading.

SEC. 1103. ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE TO BE EXPLAINED TO OFFICERS UPON COMMISSIONING.

Section 937 of title 10, United States Code (article 137 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a), by striking "(a)(1) The sections of this title (articles of the Uniform Code of Military Justice)" and inserting "(a) ENLISTED MEMBERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice)";

(2) by striking subsection (b); and

(3) by inserting after subsection (a) the following new subsections:

"(b) OFFICERS.—(1) The sections (articles) of this chapter (the Uniform Code of Military Justice) specified in paragraph (2) shall be carefully explained to each officer at the time of (or within six months after)—

"(A) the initial entrance of the officer on active duty as an officer; or

"(B) the initial commissioning of the officer in a reserve component.

"(2) This subsection applies with respect to the sections (articles) specified in subsection (a)(3) and such other sections (articles) as the Secretary concerned may prescribe by regulation.

"(c) TRAINING FOR CERTAIN OFFICERS.—Under regulations prescribed by the Secretary concerned, officers with the authority to convene courts-martial or to impose non-judicial punishment shall receive periodic training regarding the purposes and administration of this chapter. Under regulations prescribed by the Secretary of Defense, officers assigned to duty in a combatant command, who have such authority, shall receive additional specialized training regarding the purposes and administration of this chapter.

"(d) AVAILABILITY AND MAINTENANCE OF TEXT.—The text of this chapter (the Uniform Code of Military Justice) and the text of the regulations prescribed by the President under this chapter shall be—

"(1) made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination; and

"(2) maintained by the Secretary of Defense in electronic formats that are updated periodically and made available on the Internet.".

SEC. 1104. MILITARY JUSTICE CASE MANAGEMENT; DATA COLLECTION AND ACCESSIBILITY.

(a) IN GENERAL.—Subchapter XI of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§940a. Art. 140a. Case management; data collection and accessibility

"The Secretary of Defense shall prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system, including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

"(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

"(2) Case processing and management.

"(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

"(4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.".

(b) EFFECTIVE DATES.—(1) Not later than 2 years after the date of the enactment of this Act, the Secretary of Defense shall carry out section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a).

(2) Not later than 4 years after the date of the enactment of this Act, the standards and criteria under section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice), as added by subsection (a), shall take effect.

TITLE XII—MILITARY JUSTICE REVIEW PANEL AND ANNUAL REPORTS

SEC. 1201. MILITARY JUSTICE REVIEW PANEL.

Section 946 of title 10, United States Code (article 146 of the Uniform Code of Military Justice), is amended to read as follows:

“§946. Art. 146. Military Justice Review Panel

“(a) ESTABLISHMENT.—The Secretary of Defense shall establish a panel to conduct independent periodic reviews and assessments of the operation of this chapter. The panel shall be known as the ‘Military Justice Review Panel’, in this section referred to as the ‘Panel’.

“(b) MEMBERS.—(1) The Panel shall be composed of thirteen members.

“(2) Each of the following shall select one member of the Panel:

“(A) The Secretary of Defense (in consultation with the Secretary of Homeland Security).

“(B) The Attorney General.

“(C) The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps.

“(3) The Secretary of Defense shall select the remaining members of the Panel, taking into consideration recommendations made by each of the following:

“(A) The chairman and ranking minority member of the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

“(B) The Chief Justice of the United States.

"(C) The Chief Judge of the United States Court of Appeals for the Armed Forces.

"(c) QUALIFICATIONS OF MEMBERS.—The members of the Panel shall be appointed from among private United States citizens with expertise in criminal law, as well as appropriate and diverse experience in investigation, prosecution, defense, victim representation, or adjudication with respect to courts-martial, Federal civilian courts, or State courts.

"(d) CHAIR.—The Secretary of Defense shall select the chair of the Panel from among the members.

"(e) TERM; VACANCIES.—Each member shall be appointed for a term of eight years, and no member may serve more than one term. Any vacancy shall be filled in the same manner as the original appointment.

"(f) REVIEWS AND REPORTS.—

"(1) INITIAL REVIEW OF RECENT AMENDMENTS TO UCMJ.—During fiscal year 2020, the Panel shall conduct an initial review and assessment of the implementation of the amendments made to this chapter during the preceding five years. In conducting the initial review and assessment, the Panel may review such other aspects of the operation of this chapter as the Panel considers appropriate.

"(2) PERIODIC COMPREHENSIVE REVIEWS.—During fiscal year 2024 and every eight years thereafter, the Panel shall conduct a comprehensive review and assessment of the operation of this chapter.

"(3) PERIODIC INTERIM REVIEWS.—During fiscal year 2028 and every eight years thereafter, the Panel shall conduct an interim review and assessment of such other aspects of the operation of this chapter as the Panel considers appropriate. In addition, at the request of the Secretary of Defense, the Panel may, at any time, review and assess other specific matters relating to the operation of this chapter.

"(4) REPORTS.—Not later than December 31 of each year during which the Panel conducts a review and assessment under this subsection, the Panel shall submit a report on the results, including the Panel's findings and recommendations, through the Secretary of Defense to the Committees on Armed Services of the Senate and the House of Representatives.

"(g) HEARINGS.—The Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Panel considers appropriate to carry out its duties under this section.

"(h) INFORMATION FROM FEDERAL AGENCIES.—Upon request of the chair of the Panel, a department or agency of the Federal Government shall provide

information that the Panel considers necessary to carry out its duties under this section.

"(i) ADMINISTRATIVE MATTERS.—

"(1) MEMBERS TO SERVE WITHOUT PAY.—Members of the Panel shall serve without pay, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services for the Panel.

"(2) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the Panel.

"(j) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Panel.".

SEC. 1202. ANNUAL REPORTS.

Subchapter XII of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by adding at the end the following new section (article):

"§946a. Art. 146a. Annual reports

"(a) COURT OF APPEALS FOR THE ARMED FORCES.—Not later than December 31 of each year, the Court of Appeals for the Armed Forces shall submit a report that, with respect to the previous fiscal year, provides information on the number

and status of pending cases and such other matters as the Court considers appropriate regarding the operation of this chapter.

"(b) SERVICE REPORTS.—Not later than December 31 of each year, the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps shall each submit a report, with respect to the preceding fiscal year, containing the following:

"(1) Data on the number and status of pending cases.

"(2) Information on the appellate review process, including—

"(A) information on compliance with processing time goals;

"(B) descriptions of the circumstances surrounding cases in which general or special court-martial convictions were (i) reversed because of command influence or denial of the right to speedy review or (ii) otherwise remitted because of loss of records of trial or other administrative deficiencies; and

"(C) an analysis of each case in which a provision of this chapter was held unconstitutional.

"(3)(A) An explanation of measures implemented by the armed force involved to ensure the ability of judge advocates—

"(i) to participate competently as trial counsel and defense counsel in cases under this chapter;

"(ii) to preside as military judges in cases under this chapter; and

"(iii) to perform the duties of Special Victims' Counsel, when so designated under section 1044e of this title.

"(B) The explanation under subparagraph (A) shall specifically identify the measures that focus on capital cases, national security cases, sexual assault cases, and proceedings of military commissions.

"(4) The independent views of each Judge Advocate General and of the Staff Judge Advocate to the Commandant of the Marine Corps as to the sufficiency of resources available within the respective armed forces, including total workforce, funding, training, and officer and enlisted grade structure, to capably perform military justice functions.

"(5) Such other matters regarding the operation of this chapter as may be appropriate.

"(c) SUBMISSION.—Each report under this section shall be submitted—

"(1) to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives; and

"(2) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Homeland Security.".

TITLE XIII— CONFORMING AMENDMENTS AND EFFECTIVE DATES

SEC. 1301. AMENDMENTS TO UCMJ SUBCHAPTER TABLES OF SECTIONS.

The tables of sections for the specified subchapters of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), are amended as follows:

(1) The table of sections at the beginning of subchapter II is amended by striking the item relating to section 810 and inserting the following new item:

"810. 10. Restraint of persons charged.".

(2) The table of sections at the beginning of subchapter II, as amended by paragraph (1), is amended by striking the item relating to section 812 and inserting the following new item:

"812. 12. Prohibition of confinement of armed forces members with enemy prisoners and certain others.".

(3) The table of sections at the beginning of subchapter V is amended by striking the item relating to section 825a and inserting the following new item:

"825a. 25a. Number of court-martial members in capital cases.".

(4) The table of sections at the beginning of subchapter V, as amended by paragraph (3), is amended by inserting after the item relating to section 826 the following new item:

"826a. 26a. Military magistrates.".

(5) The table of sections at the beginning of subchapter V, as amended by paragraphs (3) and (4), is amended by striking the item relating to section 829 and inserting the following new item:

"829. 29. Assembly and impaneling of members; detail of new members and military judges.".

(6) The table of sections at the beginning of subchapter VI is amended by inserting after the item relating to section 830 the following new item:

"830a. 30a. Proceedings conducted before referral.".

(7) The table of sections at the beginning of subchapter VI, as amended by paragraph (6), is amended by striking the item relating to section 832 and inserting the following new item:

"832. 32. Preliminary hearing required before referral to general court-martial.".

(8) The table of sections at the beginning of subchapter VI, as amended by paragraphs (6) and (7), is amended by striking the item relating to section 833 and inserting the following new item:

"833. 33. Disposition guidance.".

(9) The table of sections at the beginning of subchapter VI, as amended by paragraphs (6), (7), and (8), is amended by striking the item relating to section 834 and inserting the following new item:

"834. 34. Advice to convening authority before referral for trial.".

(10) The table of sections at the beginning of subchapter VI, as amended by paragraphs (6), (7), (8), and (9), is amended by striking the item relating to section 835 and inserting the following new item:

"835. 35. Service of charges; commencement of trial.".

(11) The table of sections at the beginning of subchapter VII is amended by striking the item relating to section 847 and inserting the following new item:

"847. 47. Refusal of person not subject to chapter to appear, testify, or produce evidence.".

(12) The table of sections at the beginning of subchapter VII, as amended by paragraph (11), is amended by striking the item relating to section 848 and inserting the following new item:

"848. 48. Contempt.".

(13) The table of sections at the beginning of subchapter VII, as amended by paragraphs (11) and (12), is amended by striking the item relating to section 850 and inserting the following new item:

"850. 50. Admissibility of sworn testimony from records of courts of inquiry.".

(14) The table of sections at the beginning of subchapter VII, as amended by paragraphs (11), (12), and (13), is amended by striking the item relating to section 852 and inserting the following new item:

"852. 52. Votes required for conviction, sentencing, and other matters.".

(15) The table of sections at the beginning of subchapter VII, as amended by paragraphs (11), (12), (13), and (14), is amended by striking the item relating to section 853 and inserting the following new item:

"853. 53. Findings and sentencing.".

(16) The table of sections at the beginning of subchapter VIII is amended by striking the item relating to section 856 and inserting the following new item:

"856. 56. Sentencing.".

(17) The table of sections at the beginning of subchapter VIII, as amended by paragraph (16), is amended by striking the items relating to section 856a and 857a.

(18) The table of sections at the beginning of subchapter IX is amended by striking the item relating to section 860 and inserting the following new item:

"860. 60. Post-trial processing in general and special courts-martial.".

(19) The table of sections at the beginning of subchapter IX is amended by inserting after the item relating to section 860, as amended by paragraph (18), the following new items:

"860a. 60a. Limited authority to act on sentence in specified post-trial circumstances.
"860b. 60b. Post-trial actions in summary courts-martial and certain general and special courts-martial.
"860c. 60c. Entry of judgment.".

(20) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18) and (19), is amended by striking the item relating to section 861 and inserting the following new item:

"861. 61. Waiver of right to appeal; withdrawal of appeal.".

(21) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), and (20), is amended by striking the item relating to section 864 and inserting the following new item:

"864. 64. Judge advocate review of finding of guilty in summary court-martial.".

(22) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), and (21), is amended by striking the item relating to section 865 and inserting the following new item:

"865. 65. Transmittal and review of records.".

(23) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), (21), and (22), is amended by

striking the item relating to section 866 and inserting the following new item:

"866. 66. Courts of Criminal Appeals.".

(24) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), and (21), (22), and (23), is amended by striking the item relating to section 869 and inserting the following new item:

"869. 69. Review by Judge Advocate General.".

(25) The table of sections at the beginning of subchapter IX, as amended by paragraphs (18), (19), (20), (21), (22), (23), and (24), is amended by striking the item relating to section 871 and inserting the following new item:

"871. 71. [Repealed.]".

(26) The table of sections at the beginning of subchapter XI is amended by striking the item relating to section 936 and inserting the following new item:

"936. 136. Authority to administer oaths.".

(27) The table of sections at the beginning of subchapter XI, as amended by paragraph (26), is amended by inserting after the item relating to section 940 the following new item:

"940a. 140a. Case management; data collection and accessibility.".

(28) The table of sections at the beginning of subchapter XII is amended by striking the item relating to section 946 and inserting the following new items:

"946. 146. Military Justice Review Panel.
"946a. 146a. Annual reports.".

SEC. 1302. EFFECTIVE DATES.

(a) Except as otherwise provided in this Act, the amendments made by this Act shall take effect on the first day of the first calendar month that begins one year after the date of the enactment of this Act.

(b) The amendments made by this Act shall not apply to any case in which charges are referred to trial by court-martial before the effective date of such amendments. Proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been enacted.

(c)(1)(A) The amendments made by title X shall not apply to any offense committed before the effective date of such amendments.

(B) Nothing in subparagraph (A) shall be construed to invalidate the prosecution of any offense committed before the effective date of such amendments.

(2) The regulations prescribing the authorized punishments for any offense committed before the effective date of the amendments made by title VIII shall

apply the authorized punishments for the offense, as in effect at the time the offense is committed.

Section D.
Section-by-Section Analysis

Military Justice Act of 2015

Section-by-Section Analysis

Section 1 contains the short title of the bill and a table of contents for the bill.

TITLE I—GENERAL PROVISIONS

Section 101 contains amendments to Article 1 of the UCMJ concerning the definitions of "military judge" and "judge advocate," as follows:

Section 101(a) would amend the definition of "military judge" in Article 1(10) to reflect the changes in Articles 16, 19, 26, and 30a regarding the detailing of military judges. *See* Sections 401, 403, 504, and 602, *infra.*

Section 101(b) would make a technical amendment to Article 1 to reflect the 2003 name change from the "Air Force Judge Advocate General's Department" to the "Air Force Judge Advocate General's Corps."

Section 102 would amend Article 2(a)(3) of the UCMJ to clarify jurisdiction over reserve component members performing periods of inactive-duty training. The amendment would provide commanders clearer authority to address misconduct that takes place during periods incident to inactive-duty training, and during intervals between inactive-duty training on consecutive days.

Section 103 would amend Article 6, which concerns the assignment for duty of judge advocates and the role of staff judge advocates and legal officers in military justice matters. Article 6(c) currently disqualifies military judges, trial and defense counsel, investigating officers, and panel members from later acting as a staff judge advocate or legal officer to any reviewing authority in a case in which they previously participated. The proposed amendments would expressly cover military magistrates when presiding over pre-referral proceedings under Article 30a, or when presiding, with the parties' consent, over cases referred to judge-alone special courts-martial, under Article 19. *See* Sections 403, 602, *infra.* The amendments also would revise the disqualification provision under Article 6(c) to include appellate judges and counsel (including victims' counsel) who have participated previously in the same case or in any proceeding before a military judge (to include a military magistrate designated under Articles 19 or 30a), preliminary hearing officer, or appellate court in the same case.

Section 104 would amend Article 6a of the UCMJ to align the statute with the changes proposed in Article 19 and the proposed new sections, Articles 26a and 30a, concerning military magistrates. *See* Sections 403, 507, and 602, *infra.* Article 6a directs the President to prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges and military appellate judges to perform their judicial duties. The proposed amendment would add "military magistrate" to the list of officials whose fitness to perform duties shall be subject to investigation and disposition under regulations prescribed by

the President, consistent with federal law concerning the investigation and disposition of matters relating to the fitness of federal magistrate judges in the performance of their judicial duties.

Section 105 contains amendments related to the rights of victims under Article 6b of the UCMJ, as follows:

Section 105(a) would clarify the procedure for appointment of individuals to assume the rights of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, consistent with the similar provision in the Crime Victims' Rights Act. This change would conform military law to federal civilian law with respect to the procedure for appointment of individuals to assume the rights of certain victims.

Section 105(b) would clarify the relationship between the rights provided to victims under the UCMJ and the exercise of disposition discretion under Articles 30 and 34, consistent with a similar provision in the Crime Victims' Rights Act concerning the exercise of prosecutorial discretion. This change would conform military law to federal civilian law with respect to the relationship between the rights of victims and the duties of government officials to investigate crimes and properly dispose of criminal offenses.

Section 105(c) would move the recently enacted provisions concerning defense counsel interviews of victims of sex-related offenses from Article 46(b) into Article 6b and would extend those provisions to victims of all offenses, consistent with related victims' rights provisions.

Implementing regulations would address a number of matters concerning the rights of victims under Article 6b, to include: the ability of victims to be heard on the plea, confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right not to be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.

TITLE II—APPREHENSION AND RESTRAINT

Section 201 would amend Article 10 to conform the language of the statute to current practice and related statutory provisions concerning restraint of persons charged with offenses and the actions that must be taken by military commanders and convening authorities when persons subject to the Code are held for trial by court-martial. The amendments would clarify the general provisions concerning restraint under Article 10, and would incorporate into Article 10 the requirement under Article 33 for prompt forwarding of charges in cases involving pretrial confinement. The amendments would expand the requirement for prompt forwarding to cover special courts-martial as well as general courts-martial, and would require the establishment of prompt processing timeframes in the Manual for Courts-Martial. Implementing rules would address pre-referral review of confinement orders by military magistrates and military judges under the proposed Article 30a, as well as the requirements for prompt disposition of offenses by military commanders and convening authorities.

Section 202 would amend Article 12 to limit the prohibition on confinement of military members with foreign nationals to situations where the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. Under current law, it is a violation of Article 12 if a military member is held in "immediate association" with enemy prisoners or foreign nationals who are not members of the armed forces. Under current practice, however, it is not uncommon for non-U.S. citizens to be held in the same civilian confinement facilities where our military members are held during periods of pretrial or post-trial confinement. This practice was not anticipated by the drafters of the UCMJ in 1949. The proposed amendment to Article 12 would maintain the current strict prohibition against confining military members in immediate association with enemy prisoners of war, while clarifying that the restrictions in Article 12 relating to confinement of military member with "foreign nationals" are limited to situations in which the foreign nationals are not members of the U.S. Armed Forces and are detained under the law of war. This change would ease the administrative burden placed on civilian confinement facilities that hold confined military members, and would prevent military members in these facilities from being isolated unnecessarily.

TITLE III—NON-JUDICIAL PUNISHMENT

Section 301 contains amendments concerning non-judicial punishment under Article 15. Non-judicial punishment under Article 15 provides commanders with a range of disciplinary measures for minor offenses to promote good order and discipline in the armed forces and correct deficiencies in servicemembers without the stigma of a court-martial conviction. Article 15, as amended, would retain the wide range of punishments available to commanders to address misconduct through non-judicial proceedings, while precluding punishment in the form of a diet consisting only of bread and water. Implementing rules would address several issues concerning the administration of non-judicial punishment under Article 15, including the standard of evidence at non-judicial punishment proceedings, the administrative consequences of non-judicial punishment for minor disciplinary offenses, and the circumstances qualifying for the "vessel exception."

TITLE IV—COURT-MARTIAL JURISDICTION

Section 401 contains amendments concerning courts-martial classifications under Article 16 of the UCMJ. Under current law, general courts-martial consist of a military judge and not less than five members in non-capital cases, or a military judge alone upon the election of the accused. Special courts-martial consist of not less than three members, a military judge and not less than three members, or a military judge alone upon the election of the accused. Because there is a variable number of members in each case, the number of votes required for a conviction under Article 52 can fluctuate from case to case without any guiding principle to ensure consistency. *See* Section 715, *infra* (discussing voting by the court-martial panel under Article 52). The proposed amendments seek to enhance military justice and improve the consistency of court-martial panel deliberations by establishing standard panel sizes: twelve members in capital general courts-martial, eight members in non-capital general courts-martial, and four members in special courts-martial. As amended, Article 16 would include references to Article 25a (addressing panel size in capital cases), Article 25(d) (addressing the initial detailing

of members by the convening authority), and Article 29 (addressing the impaneling of members and the impact of excusals on panel composition).

Article 16(c), as amended, would require a military judge to be detailed to all special courts-martial, reflecting current military practice and similar federal and state civilian practice. The amendments also would add the option of referral to a non-jury (judge-alone) special court-martial. Such a forum is common among civilian criminal jurisdictions. *See* 18 U.S.C. § 3559; Fed. R. Crim. P. 58(b)(2); *United States v. Merrick*, 459 F.2d 644 (4th Cir. 1972). Providing commanders with this option would generate greater efficiencies in the military justice system for the adjudication of low-level, misdemeanor-equivalent offenses. As provided in the proposed amendments to Article 19, punishments at this forum could include confinement and forfeitures limited to no more than six months and would not include a punitive discharge. In addition, a military magistrate designated by the detailed military judge could preside when authorized under service regulations and with the consent of the parties. *See* Section 403, *infra.* Implementing provisions in the Manual for Courts-Martial would establish limits on the types of offenses that could be referred for trial at this forum.

Section 402 would make conforming changes to Article 18 of the UCMJ to align the statute with the revised descriptions of types of courts-martial under Article 16. The amendments also would modify Article 18 to specify the sexual offenses (currently listed by cross-reference to Article 56(b)(2)) over which general courts-martial have exclusive jurisdiction. This would accommodate the proposal under Section 801, *infra*, to repeal Article 56(b) following the enactment of sentencing parameters under Article 56(d).

Section 403 would amend Article 19 to align the statute with proposed changes in Article 16 regarding the composition of special courts-martial. *See* Section 401, *supra.*

Section 404 would amend Article 20 to clarify the status of the summary court-martial as a non-criminal forum. In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Supreme Court held that a summary court-martial does not constitute a criminal prosecution. Although a summary court-martial appropriately may result in administrative and personal consequences, it does not have the collateral consequences of a criminal conviction because it does not reflect a determination made by a judicial, criminal forum. The proposed amendment would clarify that, because of its non-judicial nature, a summary court-martial is not a "criminal prosecution," within the traditional due process understanding of a criminal prosecution (i.e., presided over by a judicial officer, and where the accused has a right to counsel) and that a finding of guilty at a summary court-martial does not constitute a "criminal conviction."

TITLE V—COMPOSITION OF COURTS-MARTIAL

Section 501 would make a technical amendment to Article 22 to reflect the current terminology for the title of an officer commanding a naval fleet, with no substantive changes.

Section 502 concerns the eligibility requirements for service on court-martial panels. The proposed amendments to Article 25 would expand the opportunity for service on a court-martial panel by permitting the detail of enlisted personnel as panel members without requiring a

specific request from the accused. As amended, Article 25 would contain the following provisions:

Article 25(c)(1) and (d)(1) would retain the statutory prohibition against detailing panel members junior in rank and grade to the accused, but the statutory prohibition against detailing enlisted panel members who are of the same unit as an enlisted accused would be eliminated. There is no such limitation on the detailing of officers from the same unit as the accused under current law. As such, current law provides an unnecessary distinction between enlisted members and officers. The amendments would eliminate this outmoded distinction, and rely instead on the well-developed procedures for voir dire and challenges to address any concerns about bias or conflicts—the same process that is used to address any issues involving officers from the same unit as the accused. This change would enhance the convening authority's ability to draw from a large pool of highly qualified members, thereby expanding the opportunity for courts-martial to reflect the input of the high caliber enlisted personnel in the modern armed forces.

Article 25(c)(2) would retain the option for the accused to request a panel with at least one-third enlisted members. In addition, it would grant the accused the option to request an all-officer panel, which is the default panel composition under current practice. The Article 25(d)(2) member-selection criteria (age, education, training, experience, length of service, and judicial temperament) would be retained to ensure that court-martial panels continue to be composed of the most highly qualified, eligible personnel. The statute's implementing rules would include appropriate adjustments to address requests for panels that include all officers or at least one-third enlisted representation.

Article 25(d)(3) would require that the convening authority detail a sufficient number of members for impanelment under the proposed amendments to Article 29. *See* Section 506, *infra.*

Section 503 would amend Article 25a to establish a standard panel size of twelve members in capital cases, consistent with the standard size for juries in federal civilian capital trials. Under current law, panels in capital courts-martial are composed of a variable number of members no fewer than twelve, which means that the number of members can vary from case to case without any guiding principle to ensure consistency. Under the statute, as amended, in the event a case becomes non-capital as a result of developments after referral but prior to impanelment, the case would proceed in accordance with the membership requirements under Articles 16 and 29. If the case becomes non-capital after twelve members have been impaneled, it would proceed with twelve members subject to the excusal provisions in Articles 29.

Section 504 contains amendments to Article 26 pertaining to the detailing and qualifications of military judges, as follows:

Section 504(a) would amend Article 26(a) to conform to the proposed amendments to Article 16 and to reflect current practice in which a military judge is detailed to every general and special court-martial.

Section 504(b) would amend Article 26(b) to provide that the Judge Advocates General certify officers to be military judges who are most qualified to serve by virtue of meeting

statutory criteria and through an evaluation of their individual education, training, experience, and judicial temperament.

Section 504(c) would amend Article 26(c) to provide for Manual provisions concerning minimum tour lengths for military judges. Implementing rules would enable the Services to apply appropriate exceptions to the minimum tour lengths.

Section 504(d) would add a new subsection (f) to Article 26 to expressly authorize cross-service detailing of military judges. Although such detailing has been addressed in the Rules for Courts-Martial, these amendments would provide clear statutory authority for this practice.

Section 504(e) would further amend Article 26 by adding a new subsection (g) to codify the position of chief trial judge. Under implementing regulations, the chief judge could detail subordinate military judges to particular cases, and carry out additional duties as directed by the Judge Advocates General or as identified in the UCMJ, MCM, and service regulations.

The proposed amendments to Article 26 also would remove the phrase "or his designee" from Article 26 in the three instances where it occurs. This change would conform the statute to current practice under the UCMJ, in which the Judge Advocate General has designated other officials to perform duties without express statutory reference to the ability to designate.

Section 505 would amend Article 27, which concerns the detailing of trial and defense counsel to courts-martial, prescribes minimum qualification requirements for counsel, and disqualifies persons who have acted as the investigating officer, military judge, or a court member from later acting as trial or defense counsel in the same case.

Section 505(1) would broaden the disqualification provision under Article 27(a)(2) to include appellate judges who have participated previously in the same case.

Section 505(2) would amend Article 27(b) to extend the qualification requirement to any assistant defense counsel detailed to a general court-martial.

Section 505(3) would amend Article 27(c)(1) by requiring any defense counsel or assistant defense counsel detailed to a special court-martial to be qualified under Article 27(b). Article 27(c)(2), as amended, would retain the authority for the Services to detail individuals such as law students preparing to become judge advocates to serve as trial counsel in special courts-martial and assistant trial counsel in both general and special courts-martial without a requirement for certification under Article 27(b), so long as such individuals are determined to be competent to perform such duties by the Judge Advocate General. These changes are consistent with current practice, applicable federal civilian practice, and with the proposed changes to Articles 16 and 26, which would require a military judge to preside at all special courts-marital.

Section 505(3) also would add a new subsection (d) to Article 27. The new provision would require, to the greatest extent practicable, in any capital case, at least one defense counsel shall be learned in the law applicable to capital cases, reflecting the standard applicable in capital cases tried in the Article III courts and before military commissions.

Section 506 contains amendments to Article 29 pertaining to the assembly, impaneling, and excusal of members, and the detailing of new court members and military judges. As amended, Article 29 would contain the following provisions:

Article 29(a) would clarify the function of assembly in general and special courts-martial with members, and the limited situations in which a member may be absent or excused after assembly of the court-martial.

Article 29(b)-(c) would require the military judge to impanel the number of members required under Articles 16 and 25a: twelve members in a capital case; eight members in a non-capital general court-martial; and four members in a special court-martial. The military judge would impanel any alternate members authorized by the convening authority in a specific case, and would then excuse any member who was detailed but not impaneled.

Article 29(d) would provide for the detail of new members if, as a result of excusals after the members have been impaneled, the membership on the panel is reduced below the following: twelve members in a capital general court-martial; six members in a non-capital general court-martial; and four members in a special court-martial. Because excusal of a member for good cause mid-trial is not a common occurrence, this provision should be used only in unusual situations. As under current law, the prohibition on further trial proceedings when the panel membership falls below the required number of members does not preclude sessions under Article 39.

Article 29(e) would address the detailing of a new military judge when the military judge is unable to proceed as a result of physical disability or otherwise.

Article 29(f) would establish the procedure for presenting the prior trial proceedings to the newly detailed members or judge. In addition to retaining the current procedure for reading a transcript of the prior proceedings, the amendment would permit the previously admitted evidence to be presented to the new members through play-back of a recording.

Section 507 would create a new section, Article 26a, which would set forth minimum qualifications under which the Judge Advocates General, in accordance with service regulations, could certify military magistrates who could preside over proceedings under Articles 19 and 30a when designated by the detailed military judge.

Under Article 26a(b), military magistrates also could be assigned to non-judicial duties if so authorized under regulations of the Secretary concerned. This provision recognizes that the services have programs through which qualified officers may be detailed to perform duties of a non-judicial nature—that is, duties that do not have to be performed by a military judge—such as issuing search authorizations or serving as a summary court-martial officer, preliminary hearing officer, or pretrial confinement review officer.

TITLE VI—PRE-TRIAL PROCEDURE

Section 601 would amend Article 30, which provides basic statutory requirements for the initial signing and swearing of criminal charges against a military accused, and for the disposition of charges and specifications by military commanders and convening authorities exercising various levels of disciplinary authority over persons subject to the Code. By reorganizing Article 30 into three subsections and removing the requirement for commanders to take "immediate steps" to dispose of charges and specifications, the amendments would improve the functionality of the statute and better align the statute's provisions with current practice.

Section 602 would create a new section, Article 30a, to authorize military judges to preside over certain pretrial issues that arise prior to referral of charges in a case. The authority under this section would extend only to issues: (1) that would be subject to post-referral review by a military judge at a general or special court-martial; and (2) that are designated expressly by the President as eligible for pre-referral review under this section. To the extent identified by the President in implementing regulations, judicial proceedings under this section could include matters currently reviewed in post-referral proceedings, such as search authorizations; requests for mental competency evaluations, individual military counsel, depositions, and subpoenas; review of pretrial confinement determinations; and enforcing victims' rights in pretrial proceedings under Article 6b. The rules prescribed by the President would set forth the procedures military judges should use under this section, and would limit the available remedies to those expressly identified by the President. Any pre-referral judicial consideration of these select issues would occur after an appropriate authority had the opportunity to take action to resolve them.

Article 30a(c) would allow the detailed military judge to designate a military magistrate to preside over the proceeding. The statute would provide for the creation of regulations by which military judges could formally review a military magistrate's rulings on pretrial matters. In addition to acting on pretrial matters, military magistrates also could preside over special court-martial cases referred as judge-alone trials, as proposed in Article 19, with the parties' consent. *See* Section 403, *supra*.

Section 603 would amend Article 32 to clarify current law concerning the requirement for and the conduct of preliminary hearings before referral of charges and specifications to general courts-martial for trial. The amendments would focus the preliminary hearing on an initial determination of probable cause, jurisdiction, and the form of the charges, and would provide for the production of evidence and the examination of witnesses to assist the preliminary hearing officer in making these determinations. In addition, the amendments would revise the requirement for a disposition recommendation—currently provided as a fourth, distinct purpose of the preliminary hearing—to focus the preliminary hearing officer more directly on providing a thorough analysis of the information developed at the hearing. The purpose of this analysis would be to inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision with respect to the charges and specifications in the case, rather than providing a disposition recommendation in summary form without supporting analysis. The report and the analysis contained within it would be advisory in nature and would be designed to assist the staff judge advocate and the convening authority. The analysis contained within the

report would not provide a basis for complaint or relief when in substantial compliance with the requirements of the amended Article 32. As amended, Article 32 would contain the following provisions:

Article 32(a) would state the issues for determination at the preliminary hearing: (1) whether or not the specification alleges an offense under the UCMJ; (2) whether or not there is probable cause to believe that the accused committed the offense charged; and (3) whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

Article 32(b) would retain and clarify current law concerning the qualifications of the preliminary hearing officer.

Article 32(c) would require the preliminary hearing officer's report to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; any necessary modifications to the form of the charges and specifications; the state of the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; a statement regarding the availability and admissibility of evidence; additional information relevant to disposition of charges and specification under Articles 30 and 34; and a discussion of any uncharged offenses. The proposed amendments recognize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

Article 32(c)(2) would provide the parties and any victim with the opportunity to submit additional information to the preliminary hearing officer for transmission for consideration by the convening authority with respect to disposition. The procedure for submission of additional information would be separate from the hearing, reflecting the broader range of information that may be pertinent to the exercise of disposition discretion. The implementing regulations would provide procedures for sealing or otherwise protecting sensitive or personal material in the additional information submitted by the parties or the victim.

Article 32(d)(3) would clarify that a victim's declination to participate in the Article 32 hearing "shall not serve as the sole basis for ordering a deposition" under Article 49. This change would ensure that a victim's declination under Article 32(d)(3) is not used to circumvent the limited purpose of depositions under Article 49: to preserve prospective witness testimony for use at trial, generally in cases where the prospective witness will be unavailable to testify in person. *See* Section 711, *infra.*

The proposed changes are based in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline—of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing—including those factors contained in the disposition guidance under the proposed new Article 33. In addition, consistent with the proposed amendments to Articles 46

and 47 (and as will be more fully developed in the Rules for Courts-Martial), the authority to issue pre-referral investigative subpoenas would be governed by a uniform policy that will apply throughout the process prior to referral, and would not be limited narrowly to Article 32 proceedings.

Section 604 contains a complete revision of Article 33. The current statute concerning forwarding of charges in general courts-martial when the accused is in confinement would be incorporated into the closely related provisions in Article 10. Article 33, as amended, would require the establishment and maintenance of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This disposition guidance would draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law. In doing so, the proposed guidance would enhance the disposition decision-making process and better align military charging practice with the standards and principles applicable in most civilian jurisdictions. The proposed disposition guidance would be issued by the Department of Defense, and would be included in the Manual for Courts-Martial as an appendix.

Section 605 would amend Article 34, which concerns the relationship between the staff judge advocate and the convening authority in the disposition decision-making process in general court-martial cases. The section would amend Article 34 to clarify ambiguities in the language of the current statute, to require judge advocate consultation before referral of charges to special courts-martial, and to expressly tie the staff judge advocate's pre-referral disposition recommendation in general courts-martial to the "in the interest of justice and discipline" standard for disposition of charges and specifications under Article 30. As amended, Article 34 would contain the following provisions:

Article 34(a) would replace and clarify the provisions concerning staff judge advocate advice before referral to general courts-martial currently contained in Article 34(a)-(b). Article 34(a)(2) would expressly tie the staff judge advocate's disposition recommendation to the "in the interest of justice and discipline" disposition standard under Article 30.

Article 34(b) would require that convening authorities consult a judge advocate on relevant legal issues before referral of charges and specifications to special courts-martial for trial, consistent with current practice.

Article 34(c) would allow formal corrections to the charges and specifications to be made before referral in both general and special courts-martial.

Article 34(d) would define "referral," in the context of Article 34, to mean "the order of the convening authority that charges and specifications against an accused be tried by a specified court-martial," consistent with current implementing regulations.

The changes to Article 34 are intended to solidify and enhance the decision-making partnership between judge advocates and court-martial convening authorities, ensuring that the

interests of justice and discipline are well-considered and appropriately balanced in each individual case. Implementing regulations will address additional changes in the rules implementing Article 34, with particular focus on the content of advice with respect to the staff judge advocate's conclusion regarding probable cause and jurisdiction, and with respect to those matters in which the staff judge advocate disagrees with the conclusions of the preliminary hearing officer. Implementing regulations also would address the baseline requirements for pre-referral judge advocate consultation on relevant legal issues in special courts-martial.

Section 606 would amend Article 35, which requires the trial counsel to ensure that a copy of the charges and specifications is served upon the accused following referral of charges. Article 35 also provides the accused with the opportunity, in time of peace, to object to the commencement of trial until the completion of a statutory period following service of charges—three days for special courts-martial, and five days for general courts-martial. These requirements, consistent with similar procedural requirements in federal district court, would ensure that military accused receive sufficient notice of the charges upon which they are to be tried by court-martial, and sufficient time to prepare for trial with their defense counsel. The present statute contains ambiguities with respect to each of these statutory requirements. The proposed revision would address these ambiguities and make other clarifying and conforming changes, none of which alter the purposes of Article 35.

TITLE VII—TRIAL PROCEDURE

Section 701 would amend Article 38 to conform it to the proposed amendments in Article 27 concerning the requirement for all defense counsel in general and special courts-martial to be qualified under Article 27(b).

Section 702 would amend Article 39 to codify current practice, in which military judges preside at arraignments. The amendments also would conform the statute to the proposed amendments to Articles 16, 19, and 53 requiring military judges to be detailed to preside over and to sentence the accused in all non-capital general courts-martial and all special courts-martial.

Section 703 would make a technical amendment to Article 40 to clarify that "a summary court-martial" is the narrow exception to the general rule that the authority to grant continuances is vested solely in the military judge, with no substantive change to the law. This change would conform the statute to the proposed amendments to Articles 16 and 19 requiring military judges to be detailed to preside over all general and special courts-martial, and would better align military practice regarding continuances with federal civilian practice.

Section 704 would amend Article 41 to conform the statute to the changes proposed in Article 16 concerning standard panel sizes in general and special courts-martial and the elimination of special courts-martial without a military judge. The statute's implementing rules would address application of the "liberal grant mandate" with respect to "for cause" challenges by each party in a general or special court-martial. *See United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (addressing the importance of ensuring that the court-martial panel is composed of individuals with a fair and open mind).

Section 705 contains amendments to Article 43 pertaining to the statute of limitations for certain UCMJ offenses. The statute would be amended as follows:

Section 705(a) would extend the statute of limitations applicable to child abuse offenses under Article 43 from the current five years or the life of the child, whichever is longer, to ten years or the life of the child, whichever is longer, thereby aligning Article 43(b)(2)(A) with 18 U.S.C. § 3283 (Offenses against children).

Section 705(b) would create a new subsection (h), extending the statute of limitations for Article 83 (fraudulent enlistment) cases from five years, as it currently stands, to (1) the length of the enlistment, in the case of enlisted members; (2) the length of the appointment, in the case of officers; or (3) five years, whichever is longer.

Section 705(c) would create a new subsection (i), extending the statute of limitations until a period of time following the implication of an identified person by DNA testing that is equal to the otherwise applicable limitations period.

Section 705(d) contains conforming amendments based on the proposed realignment of the punitive articles.

Section 705(e) establishes the applicability of the amendments made by subsections (a), (b), (c), and (d) to the prosecution of any offense committed before, on, or after the date of the enactment of the statute if the applicable limitations period has not yet expired.

Section 706 would amend Article 44 (Former jeopardy) to align the military more closely with federal civilian standards concerning double jeopardy.

Section 707 contains amendments to Article 45 concerning the pleas of the accused.

Section 707(a) would amend Article 45(b) to permit an accused to plead guilty in a capital case when the death penalty is not a mandatorily prescribed punishment. It would further amend the statute to conform to the proposed changes in Articles 16 and 19 to require a military judge to be detailed to all general and special courts-martial, and to eliminate the unnecessary requirement under current law for members to enter a finding of guilty where the military judge has already accepted the accused's guilty plea.

Section 707(b) would codify a harmless error rule in a new subsection (c) of Article 45. The proposed language is adapted from Fed. R. Crim. P. 11(h), using the language of Article 59(a) by substituting the phrase "materially prejudice the substantial rights of the accused" for the phrase "affects" substantial rights. *See* Article 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."); *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (describing Article 59(a) as the military counterpart to Fed. R. Crim. P. 52(a)). These changes would reflect federal practice and procedure with respect to harmless error and plain error review, while recognizing the unique aspects of military practice.

The proposed amendments to Article 45 aim to improve the efficiency and effectiveness of appellate review of unconditional guilty pleas, while also preserving the unique procedural protections in the military system to ensure a guilty plea is voluntary, knowing, and intelligent. The amendments fit within the larger goal of encouraging error correction at the trial stage and would make no change to the responsibilities of the military judge under Article 45(a). The changes seek to eliminate the sanction of reversal for harmless errors, and would conform the statute to the proposed changes in Article 66 (replacing automatic review in non-capital cases with review based upon the accused's right to file an appeal). Subsection (c) addresses only harmless error. Implementing rules will prescribe plain error review for matters not properly preserved at trial. The addition of subsection (c) reflects the specific structure of Article 45, and is not intended to disturb the longstanding application of standards of review, including a harmless error test, to other aspects of the Code that are not accompanied by a statutory standard of review.

Section 708 contains several amendments to Article 46 pertaining to the opportunity to obtain witnesses and other evidence and the use of subpoenas and other process for courts-martial and for investigative purposes. Currently, Article 46 states only that process issued in "court-martial cases" for witnesses and evidence shall be similar to process issued in federal district court, with no explicit subpoena authority provided, and with no distinction made between different types of proceedings under the UCMJ and the different authorities for subpoenaing witnesses and evidence at different stages in the court-martial process. The proposed changes would maintain and enhance the core features of Article 46, while strengthening the relationships among related provisions in Articles 46, 47, and 49.

Section 708(a) would revise Article 46 as follows:

Article 46(a) would be amended to clarify the provisions governing the opportunity to obtain witnesses and other evidence in cases referred to trial by court-martial.

The limitations and conditions on defense counsel interviews of victims of sex-related offenses currently in Article 46(b) would be moved to Article 6b and expanded to cover all crime victims, consistent with related victims' rights provisions under that statute.

Article 46(b) would restate the current provisions of Article 46(c).

Article 46(c) would clarify current law concerning the issuance of subpoenas or other process to compel witnesses to appear and testify before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49.

Article 46(d) would provide for subpoenas to compel the production of evidence before a court-martial, military commission, court of inquiry, or other court or board, or at a deposition under Article 49. It would also include an additional paragraph providing authority to issue subpoenas duces tecum for investigations of offenses under the UCMJ, if authorized by a general court-martial convening authority. This provision would enhance the government's ability to issue investigative subpoenas prior to trial, consistent with federal and state practice, and would

replace the provision currently contained in Article 47(a)(1) concerning the issuance of subpoenas duces tecum for Article 32 preliminary hearings. In addition, Article 46(d) would authorize military judges to issue warrants or court orders for information pertaining to stored electronic communications in the same manner as U.S. district court judges under the Stored Communications Act (Chapter 121, Title 18) subject to limitations prescribed by the President. This new provision would ensure military criminal investigative organizations and military prosecutors have access to electronic evidence during the investigative stages of court-martial cases, similar to their federal counterparts, and under the same limitations and conditions applicable in federal district court.

Article 46(e) would add a new subsection to provide explicit authority for military judges to modify, quash, or order compliance with subpoenas before and after referral of charges.

Section 708(b) would make conforming amendments to 18 U.S.C. §§ 2703 and 2711(3) to include process issued in court-martial proceedings.

Section 709 contains amendments to Article 47, which provides for criminal prosecution in U.S. district court of civilians who fail to comply with military subpoenas issued under Article 46. The amendments would retain current law under Article 47(a), while updating and clarifying the statute's provisions and the relationship between Articles 46 and 47.

Section 710 would amend Article 48, which provides statutory authority for the punishment of acts of contempt and violations of court orders and rules in courts-martial and other proceedings under the UCMJ. In 2011, Congress made significant amendments to Article 48 that provided a more direct means for military judges to enforce court orders and military subpoenas, and better aligned the contempt authority and procedures in military courts with those in federal district courts. However, the language of the statute as amended is ambiguous with respect to the contempt power of judges serving on the Court of Appeals for the Armed Forces and the military Courts of Criminal Appeals.

Section 710(a) would clarify the recent amendments to Article 48 by defining the judicial officers who may exercise the contempt authority to include judges of the Court of Appeals for the Armed Forces and the Courts of Criminal Appeals; military judges detailed to courts-martial, provost courts, military commissions, or any other proceeding under the UCMJ (including the proposed Article 30a proceedings); military magistrates designated under Articles 19 or 30a; commissioned officers detailed as summary courts-martial; and presidents of courts of inquiry.

Section 710(b) would transfer the review function for contempt punishments issued by military and appellate judges from the convening authority to the appropriate appellate court. This change would strengthen the contempt power and would ensure that persons held in contempt of court by military judges and appellate judges—particularly civilian attorneys and witnesses—are afforded a fair appellate review process, comparable to the review process applicable in civilian criminal courts and appellate courts across the country. The convening authority's review function would be retained for contempt punishments issued by summary courts-martial and courts of inquiry.

Section 711 contains a complete revision of Article 49. Article 49 provides statutory authority for the taking of depositions by the parties of a court-martial; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Consistent with Article 36, the proposed amendments would conform Article 49's substantive provisions, to the extent practicable, to the procedures and principles of law pertaining to depositions applicable in federal district court. These amendments also would conform the statute to the Confrontation Clause. As revised, Article 49 would contain the following provisions:

Article 49(a) would better align military deposition practice under Article 49 with federal and state deposition practice, and with the authority to issue and enforce subpoenas for witnesses under Articles 46 and 47, by ensuring that depositions of prospective witnesses will generally be ordered only when it is likely that the witness's trial testimony otherwise would be lost. By eliminating the reference to Article 32 preliminary hearings, the proposed amendments would ensure that depositions are permitted only for the purpose of preserving testimony for trial, not for pretrial discovery purposes. As amended, subsection (a) would conform to the proposed Article 30a concerning pre-referral duties of military judges. As amended, the authority to order depositions could be exercised by military judges detailed under Articles 26 or 30a (consistent with the definition of "military judge" proposed under Article 1(10)), as well as military magistrates designated by the detailed military judge under Articles 19 or 30a.

Article 49(a)(3) would replace and clarify the requirement for notice currently contained in subsection (b).

Article 49(a)(4) would replace and update subsection (c), providing greater consistency between Articles 49 and 32 with respect to the qualifications of deposition officers and preliminary hearing officers.

Article 49(b) would replace and update the counsel provisions currently contained in subsection (a), ensuring that the parties at a deposition will be represented by counsel detailed in the same manner as under Articles 27 and 38.

Article 49(c) would update and replace obsolete provisions in subsection (d) concerning the admissibility of depositions as evidence at trial. These changes would reflect the adoption of the Military Rules of Evidence in 1980 and provide greater consistency with federal civilian deposition practice.

Article 49(d) would update and replace subsections (e) and (f) to clarify the prohibition on the use of depositions in capital cases by the government.

Section 712 would amend Article 50 to update the statute to permit sworn testimony from a court of inquiry to be played from an audiovisual recording if the deposed witness is unavailable at trial and the evidence is otherwise admissible under the rules of evidence.

Section 713 would amend Article 50a to conform the statute to the proposed changes in Article 16 to eliminate special courts-martial without a military judge.

Section 714 would amend Article 51, which concerns voting by members of a court-martial and rulings by military judges. These amendments would remove statutory references to courts-martial without a military judge, reflecting the proposed amendments to Article 16 to require the detailing of a military judge in all general and special courts-martial. The amendments would retain current law and procedures for voting on the findings and sentence, and for rulings by the military judge, other than those aspects of Article 51 and the implementing rules which specifically concern courts-martial without a detailed military judge.

Section 715 would amend Article 52 concerning the number of votes required for the findings in members cases, and for the findings and sentence in capital cases. Under current law, because the requirement for a two-thirds vote on the findings (and on most sentences) in Article 52 establishes a floor, not a fixed requirement, none of the parties or the public knows at the outset of a court-martial how many votes will be required for a conviction. The percentage required for a conviction and for a specific sentence can be affected significantly by the number of members detailed to a court-martial and the number of members removed through excusal, challenges for cause, and peremptory challenges. As a result, it is not unusual to see variations in voting requirements ranging from 67 percent to 80 percent of the members of the court-martial panel. The proposed amendments, in conjunction with the proposal for standard panel sizes under Article 16, would standardize the voting requirement in each type of court-martial at three-fourths (75 percent) in non-capital members cases, and unanimous on the findings and the sentence in capital cases. The proposal also would make conforming changes to align Article 52 with the proposed changes in Articles 16, 25a, and 53 with respect to capital cases and judge-alone sentencing. Implementing rules would address the procedures concerning voting on sentences of death, life without the possibility of parole, and other lawful sentences.

Section 716 would amend Article 53 to provide for judicial sentencing in all general and special courts-martial. This change would better align military sentencing practice with federal civilian sentencing practice, as well as the practice in the majority of state jurisdictions. Judicial sentencing would create the opportunity for greater uniformity and consistency in court-martial sentences, enhanced efficiency and cost-savings, and would facilitate further reforms in military sentencing practices and procedures.

Article 53(c), as amended, would provide that, for capital offenses, members will determine whether the sentence shall include death, life without eligibility for parole, or such other lesser punishments as may be determined by the military judge. The military judge would sentence the accused in accordance with the determination of the members, including to other lesser punishments in accordance with regulations prescribed by the President.

Implementing rules would address procedures for sentencing proceedings and sentence determination in the context of judge-alone sentencing, including with respect to: releasing the members, subject to recall, after the findings are announced in a non-capital case; the admissibility of sentencing information offered by the parties and the grounds for objection to such information; the rights of victims to participate in sentencing proceedings; the use of victim impact statements during sentencing; the duties of trial and defense counsel before and during the proceeding; the rules and factors to guide military judges in their sentence determinations

(similar to 18 U.S.C. § 3553(a)); and rules pertaining to appellate review of military judge sentence determinations and findings.

Section 717 would create a new section, Article 53a, transferring the statutory authority for plea agreements from Article 60 to the new Article 53a. The proposed new article would provide basic rules for: (1) the construction and negotiation of plea agreements concerning the charge and the sentence; (2) allowing the convening authority and the accused to enter into binding agreements regarding the sentence that may be adjudged at a court-martial; and (3) the military judge's determination of whether to accept a proposed plea agreement in a general or special court-martial. Under the amended statute, the military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful. The new statute would preserve current law pertaining to plea agreements involving offenses with mandatory minimum sentences.

Implementing rules for the new Article 53a would address a number of issues concerning plea agreements, including the structure and procedures for sentence agreements; the opportunity for negotiated sentencing ranges; a requirement that, if the military judge determines that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination; plea agreements in summary courts-martial; and the role of the victim in plea agreements, with particular emphasis on the rules structuring the convening authority's decision-making with respect to acceptance of plea agreements proposed by the defense.

Section 718 would amend Article 54, which provides the basic rules and procedures for producing, authenticating, and distributing records of proceedings in general, special, and summary courts-martial. The amendments would facilitate the use of modern court reporting technology in the recording, certification, and distribution of court-martial records. The use of this technology would streamline preparation and distribution of the record of trial in light of recent amendments that reduce or eliminate post-trial proceedings under Article 60. In addition, the proposed amendments would increase the availability of court-martial records to victims of crime.

The amendments to Article 54 would: (1) require the court reporter, instead of the military judge or the prosecutor, to certify the record of trial; (2) require a complete record of trial in any general or special court-martial if the sentence includes death, dismissal, discharge, or confinement or forfeitures for more than six months; and (3) provide all victims who testify at a court-martial with access to records of trial, eliminating the distinction in the statute that currently provides such access only to victims of sex-related offenses under Article 120.

Changes in the rules implementing Article 54 would address the opportunity to file a motion to correct the record, utilizing procedures similar to those available in the federal civilian courts. Implementing rules also would address the rules for providing a "complete" record of trial, including the circumstances under which a written transcript will be prepared and the procedures

for preparing a written transcript. In the near term, the statute's implementing rules would provide for the availability of a written transcript during the appellate process in the types of cases in which a written transcript is available under current military practice, subject to rules similar to the federal rule for requesting all or part of a transcript. Implementing rules also would address the potential in the future for use in the appellate process of electronic transcriptions to the extent that the development and use of such technology for legal proceedings provides for increasing comfort and familiarity with electronic formats.

TITLE VIII—SENTENCES

Section 801 would amend Article 56, which provides the authority for the President to set maximum punishments for UCMJ violations, subject to any maximum or mandatory punishments Congress has established in the UCMJ. The President has exercised this authority in two ways: (1) by limiting the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003; and (2) by limiting the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed at a court-martial.

The proposed amendments would align court-martial sentencing procedures with the proposal for judicial sentencing in all non-capital general and special courts-martial. *See* Section 716, *supra.* The amendments are designed to be phased in over a four-year period to enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system. The amendments also would increase the transparency of military sentencing practices and provide additional structure in sentencing, while retaining flexibility in determining an appropriate sentence for the individual.

The amendments proposed in Section 801 would take effect in two phases, as follows:

Phase One. The first phase would begin on the date the legislation is enacted. During the first phase, the Military Sentencing Parameters and Criteria Board (the Board) would begin the process of gathering sentencing data for the development of sentencing parameters and criteria. During this Phase, the President would establish interim guidance, to become effective upon the effective date of the legislation. The Board would be primarily responsible for developing the interim guidance. In this phase, judicial sentencing in all non-capital general and special courts-martial would take effect. *See* Section 716, *supra*. Under judicial sentencing, the current adversarial sentencing process (which utilizes many of the procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. The sentencing process during the first phase also would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without any explanation as to how the sentence was reached or which portions of the sentence are attributable to which offense.

In the first phase, which would be completed within four years after the legislation is enacted, the Board also would develop sentencing parameters and criteria to replace the interim guidance. The sentencing parameters and criteria proposed by the Board would be subject to

approval by the President. As in many civilian courts, a sentencing parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board also would establish sentencing criteria—factors that a judge must consider when sentencing a case, but that do not propose a specific punishment. The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance. Until the parameters and criteria are implemented, the sentencing process would utilize the procedures set forth in Phase One.

Phase Two. In the second phase, which would begin four years after the legislation is enacted, the parameters and criteria approved by the President would apply to sentencing proceedings for general and special courts-martial. Military judges would utilize the parameters and criteria in conjunction with the segmented sentencing procedures and other changes in the sentencing process developed during Phase One. Military judges would retain discretion to sentence outside parameters in order to fashion individualized sentences, subject to a requirement to set forth on the record reasons for any departure.

Finally, once sentencing parameters are in place, this proposal would authorize government appeals of sentences and eliminate the requirement for mandatory minimum discharges. By addressing sentencing discretion through the use of parameters, Article 56 would reduce the need for rigid mandatory minimum sentences.

Section 801(a) would amend Article 56 in its entirety. As amended, Article 56 would contain the following provisions:

Article 56(a)-(b) would retain current law regarding maximum and minimum sentences, subject to Section 801(d), *infra.*

Article 56(c)(1) would enumerate factors the court-martial would be required to consider before imposing a sentence. The proposed factors are adapted from 18 U.S.C. § 3553(a).

Article 56(c)(2) would require the military judge to determine a sentence in accordance with the sentencing parameters established by the President. Consistent with federal civilian practice, a military judge could sentence outside the parameter based upon written factual findings that such a sentence is justified. This paragraph would not apply to summary courts-martial.

Article 56(c)(3) would require the military judge to consider sentencing criteria established by the President when determining a sentence. The sentencing criteria would provide factors for the military judge to consider, and would not direct any specific punishment. This paragraph would not apply to summary courts-martial.

Article 56(c)(4) would require the military judge to determine the appropriate amount of fine and confinement for each separate offense of which the accused is found guilty. The assignment of a specific sentence for each offense is designed to provide additional transparency to the

parties and the public and advance the purposes of sentencing. With respect to all other punishments (discharges, reductions, forfeitures, and similar unique military punishments), the current practice of awarding a single sentence for all offenses would be retained, as these punishments are not readily segmented. To ensure the accused is not punished twice for what is substantially one offense, the military judge would be required to determine whether periods of confinement should run concurrently or consecutively. The requirement to determine whether sentences should run concurrently or consecutively is in the statute, and the process for making the determination is left to the Rules for Courts-Martial. A sentence to confinement for one offense that runs concurrently with the sentence to confinement of another offense would not increase the total period of confinement for purposes of determining whether the period of confinement satisfies a jurisdictional predicate (i.e., confinement for more than six months) for an appeal as of right to the Court of Criminal Appeals under proposed revisions to Article 66(b)(1)(A). In general, this subsection envisions requiring military judges to impose concurrent sentences when the offenses involve the same act, transaction, or criminal objective and the same victim. This would be similar to the rules governing the grouping of offenses under § 3D1.2(a-b) of the United States Sentencing Commission Guidelines Manual. In other circumstances, the decision to have sentences run concurrently would be left to the discretion of the judge, informed by consideration of the purposes of sentencing. This paragraph would not apply to summary courts-martial.

Article 56(c)(5) would provide that sentencing parameters and criteria do not apply to the issue of whether an offense should be punished by death.

Article 56(c)(6) would incorporate Article 56a (Sentence of confinement for life without eligibility for parole) into Article 56 without substantive change. Article 56a would be repealed. *See* Section 801(b), *infra*.

Article 56(d)(1) would require the President to establish sentencing parameters and criteria.

Article 56(d)(2) would establish the requirements for sentencing parameters. Except for unique military offenses, all violations of the UCMJ would be assigned to between seven and twelve offense categories. Each offense category would specify a range of confinement and may include an appropriate range for other punishments such as discharges. The subsection also would prescribe the minimum requirements for each sentencing parameter.

Article 56(d)(3) defines sentencing criteria as factors that the military judge must consider when sentencing. Under the proposal, there are two types of sentencing criteria: criteria that inform how to punish a violation of a specific offense (e.g., factors that aggravate or mitigate the harm of a military offense); and criteria that inform when certain punishments may be appropriate or inappropriate (e.g., factors that inform when a reduction or discharge may be appropriate).

Article 56(d)(4) would create the Military Sentencing Parameters and Criteria Board to develop parameters and criteria. The Board would be created within the Department of Defense, and would be composed of the chief trial judge of each service, subject to the opportunity to detail alternate members when required by circumstances applicable to the Navy, Marine Corps,

and Coast Guard. The chief trial judges would be detailed by the Judge Advocate General of each military Service and the Secretary of Defense would select a chair and vice-chair of the Board. Service on the Board would be a collateral duty. The Board would have non-voting members designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the General Counsel of the Department of Defense. The Department of Defense would provide full-time staff to assist the Board.

Article 56(d)(5) would prescribe the duties of the Board. The Board would be required to develop sentencing parameters, criteria, and sentencing rules for submission to the President. The Board also could promulgate non-binding policies on sentencing. In fulfilling its duties, the Board would be required to consult with commanders, enlisted leaders, practitioners, and others. The Board would be required to establish two advisory groups. The first advisory group would be composed of senior officer and enlisted members who provide guidance on the effectiveness of military justice on discipline. The second advisory group would be composed of military justice practitioners.

Article 56(e) would provide for limited appeal of sentences by the government. This right would be available only after the establishment of sentencing parameters. Similar to 18 U.S.C. § 3742(b)(4), the government would be required to obtain the approval of the Judge Advocate General before filing an appeal on the sentence. Finally, such appeals would be limited to whether the sentence is illegal, calculated incorrectly, or is plainly unreasonable. In determining whether a sentence is plainly unreasonable, a Court of Criminal Appeals could, but would not be required to, presume that a sentence within a sentencing parameter is reasonable. The core of the subsection is taken from 18 U.S.C. § 3742, modified for military practice and reflecting the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

Section 801(b) is a conforming amendment.

Section 801(c) would require the President to prescribe the regulations for sentencing parameters and criteria required by Article 56(d), as amended, not later than four years after enactment of the bill. It also would require the President to prescribe interim guidance.

Section 801(d) would repeal Article 56(b) and Article 53a(d) upon the taking effect of sentencing parameters for the offenses specified in Article 56(b)(2) that have mandatory minimum punishments. *See also* Section 717, *supra.*

Section 802(a) would consolidate Articles 57, 57a, and 71 into Article 57 (Effective date of sentences) to address in a single article the effective date for all punishments that could be adjudged at a court-martial. Article 57, as amended, would contain the following provisions:

Article 57(a) would establish when the punishment adjudged at a court-martial sentence becomes effective. The proposed subsection combines portions of Articles 57, 57a, and 71, and removes the distinction between when a sentence becomes effective and when it is ordered executed. With the exception of death and punitive discharges, sentences would be effective by operation of law without any additional approval upon entry of judgment. This is a conforming

change to the proposed changes in Article 60 (Post-trial processing in general and special courts-martial) and the proposed enactment of Articles 60a (Limited authority to act on sentence in specified post-trial circumstances), 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial), and 60c (Entry of judgment).

Article 57(a)(1) would address when forfeitures and reduction become effective. The first sentence of this paragraph is taken without modification from Article 57(a)(3). The remainder of this paragraph is taken from Article 57(a)(1).

Article 57(a)(2) is taken, without change, from Article 57(b). Article 57(b) would be modified to apply only to summary courts-martial.

Article 57(a)(3) is taken, without change, from Article 71(a).

Article 57(a)(4) is taken, without change, from Article 71(b).

Article 57(a)(5) is taken from Article 71(c)(1) with modification. The provisions of Article 71(c)(1) regarding waiver or withdrawal of an appeal and the definition of what constitutes a final appeal are consolidated in subsection (c).

Article 57(a)(6) is taken from Article 57(c) with modification. As a conforming change to the proposal for Article 60c, in general and special courts-martial "entry of judgment" is substituted for "on the date ordered executed." *See* Section 904, *infra*. For consistency, a summary court-martial sentence would become effective when approved by the convening authority.

Article 57(b)(1) is a combination of Article 57(a)(2), authorizing the deferment of forfeitures and reduction, and Article 57a(a), authorizing the deferment of confinement. The definition of convening authority is taken from Article 57a(a). As a conforming change to the proposal for Article 60c, the deferment of a sentence would terminate upon entry of judgment.

Article 57(b)(2)-(4) are taken from Article 57a(b)(1)-(3), with no substantive changes.

Article 57(b)(5) is taken from Article 57a(c) with conforming changes to reflect the proposed new section, Article 60c (Entry of judgment). *See* Section 904, *infra.*

Article 57(c)(1) is taken from Article 71(c)(1)-(2) with modification to reflect the proposal for an appeal of right. Under the revised language, appellate review would be complete when an Article 65 review is finished, or when the Court of Criminal Appeals has reviewed the case and any petition to a higher court for review has been addressed, or the time to petition higher courts has expired. Paragraph (2) incorporates the current provision in Article 71(c)(1) that the completion of appellate review is a final determination on the legality of the proceedings.

Section 802(b) contains conforming amendments to strike Articles 57a and 71 and an additional conforming amendment to Article 58b.

Section 803 would amend Article 58a (Sentences: reduction in enlisted grade upon approval), which provides a mechanism for the individual services to order a reduction of enlisted members to the grade of E-1 whenever the approved sentence of a court-martial includes a punitive discharge, confinement, or hard labor without confinement. The amendments would conform the statute to the changes proposed in post-trial procedure under Article 60 and the proposed Article 60c (Entry of judgment). *See* Section 904, *infra.*

Section 804 would sunset Article 58a after the enactment of sentencing parameters and criteria under Article 56. This sunset provision is consistent with the proposals for judge-alone sentencing under Article 53 and for sentencing parameters and criteria under Article 56. *See* Sections 716 and 801, *supra.* The sentencing parameters and criteria proposed in Section 801 would include objective factors for the military judge to consider in determining whether a sentence should include a reduction in pay grade.

TITLE IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

Sections 901-904 concern post-trial processing and post-trial action by the convening authority. These processes are currently prescribed under Article 60 (Action by the convening authority). These sections would amend Article 60 of the UCMJ in its entirety.

Section 901 would amend Article 60 to provide for the distribution of the trial results and to authorize the filing of post-trial motions with the military judge in general and special courts-martial. The convening authority's role in post-trial processing would be moved to new Articles 60a and 60b. *See* Sections 902-903, *infra.* Article 60, as amended, would include the following provisions:

Article 60(a) would require the military judge to immediately enter into the record the Statement of Trial Results, consisting of the pleas of the accused, the findings and sentence of the court-martial, and any other information required by the President. The statute would require that copies be provided to the convening authority, the accused, and any victim of any offense. The statement of trial results would serve as the basis for the entry of judgment under Article 60c.

Article 60(b) would require the President to establish rules governing submission of post-trial motions to the military judge. The implementing rules would establish filing deadlines for the parties and provide explicit authority for the military judge and convening authority to direct post-trial hearings when necessary to address allegations of legal error. The authority to order post-trial hearings would replace the previous authority to order proceedings in revision. *See* Article 60(f)(1)-(2).

Section 902 would create a new section, Article 60a (Limited authority to act on sentence in specified post-trial circumstances), which would retain current limitations on the convening authority's post-trial actions in most general and special courts-martial, subject to a narrowly limited suspension authority under Article 60a(c) and a revised authority related to substantial assistance under Article 60a(d). Article 60a, as proposed, would contain the following provisions:

Article 60a(a)-(b) would retain and clarify existing limitations on the convening authority's post-trial actions in general and special courts-martial in which: (1) the maximum sentence of confinement for any offense is more than two years; (2) adjudged confinement exceeds six months; (3) the sentence includes dismissal or discharge; or (4) the accused is found guilty of designated sex-related offenses. Under current law, the convening authority in such cases is prohibited from modifying the findings of the court-martial, or reducing, commuting, or suspending a punishment of death, confinement of more than six months, or a punitive discharge.

Article 60a(c) would provide a limited suspension authority in specified circumstances. For the convening authority to exercise this authority, the military judge would be required to make a specific suspension recommendation in the Statement of Trial Results. The suspension authority under subsection (c) would be limited to punishments of confinement in excess of six months and punitive discharges.

Article 60a(d) would retain, with clarifying amendments, the key features of current law with respect to the convening authority's power to reduce the sentence of an accused who assists in the prosecution or investigation of another person. As amended, the President may prescribe rules providing for a convening authority to exercise this power after entry of judgment. This provision is designed to allow for the reduction of a sentence of an accused who provides substantial assistance in the prosecution of another person, even well after his own trial is over and appellate review is complete. The implementing rules will be modeled on Fed. R. Crim. P. 35(b).

Article 60a(e) would allow the accused and a victim of the offense to submit matters to the convening authority for consideration. The implementing rules would establish the timelines for submitting matters under this subsection and procedures for responding to submissions. The implementing rules also would require the accused and victim to have a copy or access to the recording of the open sessions of the court-martial and admitted unsealed exhibits.

Article 60a(f) would require the decision of the convening authority to be forwarded to the military judge. If the convening authority modified the sentence of the court-martial, the convening authority would be required to explain the reasons for the modification. An explanation for the convening authority's decision would only be required when the convening authority modifies the sentence. No approval of the findings or sentence would be required. The decision of the convening authority would be forwarded to the military judge, who would incorporate any change in the sentence into the entry of judgment. In a case where the accused provides substantial assistance under subsection (d) and a designated convening authority reduces the sentence of the accused after entry of judgment, the convening authority's action would be forwarded to the chief trial judge, who would be responsible for ensuring appropriate modification of the entry of judgment. Because a modification might happen during or after the completion of appellate review, the modified entry of judgment would be forwarded to the Judge Advocate General for appropriate action.

Section 903 would create a new section, Article 60b (Post-trial actions in summary courts-martial and certain general and special courts-martial). The new section would retain and clarify

the convening authority's post-trial authorities and responsibilities with respect to the findings and sentence of a court-martial not covered by subsection (a)(2) of new Article 60a. This post-trial authority would be available in summary courts-martial and a limited number of general and special courts-martial which, because of the offenses charged and the sentence adjudged, would not be covered under Article 60a. Consistent with existing law, the convening authority in such cases would be authorized to act on the findings and the sentence, and could order rehearings, subject to certain limitations. The procedural requirements under Article 60b, to include consideration of matters submitted by the accused and victim, would be the same as those provided in Article 60a. In summary courts-martial, the convening authority would be required to act on the sentence, and would have discretion to act on the findings, as under current law.

Section 904 would create a new section, Article 60c (Entry of judgment). The entry of judgment would require the military judge to enter the judgment of the court-martial into the record in all general and special courts-martial, and would mark the conclusion of trial proceedings. The judgment would reflect the Statement of Trial Results, any action by the convening authority on the findings or sentence, and any post-trial rulings by the military judge. The judgment also would indicate the time when the accused's case becomes eligible for direct appeal to a Court of Criminal Appeals under Article 66, or for review by the Judge Advocate General under Article 65. This requirement for an entry of judgment is modeled after Fed. R. Crim. P. 32(k). The findings and sentence of a summary court-martial, as modified by any post-trial action by the convening authority under Article 60b, would constitute the judgment of the court-martial.

Section 905 would amend Article 61, which provides that an accused may file a statement with the convening authority expressly waiving the right to appellate review under Article 66 or Article 69. The amendments would conform the statute to the changes proposed in Articles 60, 65, and 69 concerning post-trial processing. *See* Sections 901-904, *supra*; Sections 909, 913, *infra*.

Section 906 concerns government interlocutory appeals. Presently, Article 62 provides a limited basis for government interlocutory appeals. This section would amend Article 62 to better align interlocutory appeals in the military with federal civilian practice, by authorizing an appeal when, upon defense motion, the military judge sets aside a panel's finding of guilty because of legally insufficient evidence. Additionally, the amendments would better align Article 62 with the rule of construction applicable to 18 U.S.C. § 3731, by directing military courts to liberally construe the statute's provisions to effect its purposes. As amended, the authority for interlocutory appeals under Article 62 would be extended to all general and special courts-martial, which would replace the current limitation authorizing such appeals only if the offense at issue carries the potential for a punitive discharge.

Section 907 would amend Article 63 to remove the sentence limitation at a rehearing in cases in which: (1) an accused changes his or her plea from guilty to not guilty, or otherwise fails to comply with the terms a pretrial agreement; or (2) a sentence is set aside based on a government appeal. The amendments would better align military practice with federal civilian practice in the area of rehearings.

Section 908 concerns review of court-martial cases not otherwise subject to appellate review under Article 66 or review by the Office of the Judge Advocate General under Article 69. Under current law, Article 64 provides for judge advocate review of such cases, including conclusions as to jurisdiction, whether the charges and specifications stated offenses, and whether the sentence was within the limits prescribed by law. This section would amend Article 64 to apply only to the initial review of summary courts-martial. Article 65, as amended, would provide for review of general and special courts-martial that do not qualify for direct review by the Courts of Criminal Appeals. No substantive changes to the procedures or scope of review of summary courts-martial would be made. Implementing rules will address the opportunity for an accused to consult with counsel before filing any matter in connection with an Article 64 review.

Section 909 would amend Article 65 to conform the statute to the changes proposed in Articles 66 and 69. *See* Sections 910, 914, *infra*. As amended, Article 65 would: (1) provide additional guidance on the disposition of records; (2) require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for direct review under Article 66; and (3) provide for appellate review of all cases that are not subject to direct appellate review by a Court of Criminal Appeals, similar to the current review under Article 64. As amended, Article 65 would contain the following provisions:

Article 65(a) would require the record of trial in all general and special courts-martial in which there is a finding of guilty to be transmitted to the Office of the Judge Advocate General. In all other cases, the records of trial would be transmitted and disposed of in accordance with service regulations.

Article 65(b) would address the processing of records of trial in cases eligible for direct appeal to a Court of Criminal Appeals. Under paragraph (1), consistent with current practice, if the judgment of the court-martial included a sentence of death, the Judge Advocate General would be required to forward the record of trial to the Court of Criminal Appeals for automatic review. Paragraph (2) would address processing of records of trial in cases eligible for direct review by a Court of Criminal Appeals under Article 66(b)(1). The Judge Advocate General would be required to forward a copy of the record to an appellate defense counsel, who would be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals. The appellate defense counsel would review the record, advise the accused on the merits of an appeal, and, upon request, file the appeal with the Court of Criminal Appeals. The accused would be able to request that a copy of the record of trial be forwarded to civilian counsel provided by the accused. These provisions would not apply if the accused waived the right to appeal under Article 61 or declined representation by appellate defense counsel.

Article 65(c) would require the Judge Advocate General to provide a "Notice of the Right to Appeal" to an accused eligible to file an appeal under Article 66(b)(1).

Article 65(d) would provide for limited review by an attorney within the Office of Judge Advocate General, or another attorney designated under service regulations, in cases not eligible for direct appeal to a Court of Criminal Appeals under Articles 66(b). Cases not eligible for direct review under Article 66 would be those in which a punitive discharge was not imposed

and confinement imposed was for six months or less. The review would focus on three issues: whether the court-martial had jurisdiction over the accused and the offense; whether each charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. The review also would include a response to any allegation of error submitted by the accused in writing. Under paragraph (3), this limited review—except for the response to allegations of error—also would be provided when an accused who is eligible to file an appeal for direct review under Article 66 waives or withdraws from appellate review, and when an accused fails to file an appeal under Article 66. This limited and expeditious review would satisfy a condition precedent to execution of certain sentences under Article 57 (Effective date of sentences), as amended. *See* Section 802, *supra*.

Article 65(e) would provide that, if the attorney conducting the review under subsection (d) believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part. If the Judge Advocate General sets aside the findings or sentence, he or she would be required to either order a rehearing or dismiss the charges. In addition, where the Judge Advocate General sets aside the findings or sentence and orders a rehearing, if the convening authority determines that a rehearing would be impractical, the convening authority should dismiss the charges.

Under the related proposal for Article 64, summary courts-martial would still be reviewed under the procedures contained in that statute. General and special courts-martial reviewed under Article 65, as well as summary courts-martial reviewed under Article 64, would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra*. Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

Section 910 would amend Article 66 to revise the scope of review and enlarge the category of cases eligible for review by the Courts of Criminal Appeals under Article 66. Specifically, the proposed amendments would: (1) replace automatic review in non-capital cases with a filing procedure similar to the appeal as of right process used in the federal civilian appellate courts; (2) retain mandatory review in capital cases; (3) provide for discretionary review by the Courts of Criminal Appeals in cases that are not eligible for an appeal as of right; (4) provide standards of review for appeals; and (5) codify the authority of Courts of Criminal Appeals to remand cases and order rehearings. As amended, Article 66 would contain the following provisions:

Article 66(a) would require the President to establish minimum tour lengths, with appropriate exceptions, for appellate military judges, and would require the Judge Advocate General of each service to certify the qualifications of appellate military judges consistent with the proposed amendment to Article 26 regarding the assignment and qualifications of military judges. *See* Section 504(b), *supra*. Implementing rules will reflect the Services' role and discretion in applying exceptions to the minimum tour lengths.

Article 66(b) would expand the categories of cases in which servicemembers may seek direct review by the Courts of Criminal Appeals. It would replace automatic review in non-capital cases with an appeal of right. It also would continue to require automatic review of all capital

cases. The amendments would provide every servicemember found guilty of an offense by a court-martial with a pathway to review by a court of record. As amended, there would be two prerequisites for review of non-capital cases by the Courts of Criminal Appeals under Article 66(b): (1) entry of the court-martial judgment into the record by a military judge under proposed Article 60c; and (2) timely filing of an appeal. The Court of Criminal Appeals would be able to review: (1) any case with a sentence to a punitive separation or confinement of more than six months; (2) any case that was previously the subject of an appeal by the United States under Article 62 or Article 56; and (3) any other case in which an application for discretionary review under Article 69(e)(2) was granted. For purposes of this subsection, the term "confinement for more than six months" would mean the total period of confinement adjudged, but would not aggregate periods of confinement running concurrently.

Article 66(c) prescribes jurisdictional timelines for appellate review by the Courts of Criminal Appeals.

Article 66(d) defines the duties of the Courts of Criminal Appeals, which would be consistent with current practice except that the obligation to review every case for factual sufficiency and sentence appropriateness would be eliminated. Under paragraph (3), the Courts of Criminal Appeals could provide relief for post-trial errors and excessive post-trial delay.

Article 66(e) details the limited authorities of the Courts of Criminal Appeals to weigh and consider evidence. The Court's authority to set aside a finding that is contrary to the weight of the evidence would be retained, but would require the accused to identify deficiencies in the proof and would allow the Court to set aside such findings only if "clearly convinced that the finding was against the weight of the evidence." This would channel the exercise of such authority through standards that are more deferential to the factfinder at trial and more reviewable by higher courts.

Article 66(e)(2) would address consideration of the entire case, including a finding of guilty and the sentence. The Court's authority to weigh the evidence and to determine controverted questions of fact would be retained, but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial. This change would enable application of differing standards of review tailored to widely varied matters, including rulings on pretrial motions, the findings and sentence adjudged by the court-martial, and sentences of death determined by members.

Article 66(f) would provide standards of review applicable to sentences adjudged both before and after sentencing parameters are implemented under the proposed amendments to Article 56. *See* Section 801, *supra.* The proposed standards of review would provide the accused with several avenues to appeal a court-martial sentence. First, the accused would be able to appeal a sentence that was unlawful, or that resulted from incorrect application of a sentencing parameter. Second, consistent with the government's ability to appeal a sentence under Article 56(e) (as amended) the accused could appeal a sentence on the grounds that it is plainly unreasonable. *See* Section 801, *supra.* The term "plainly unreasonable" is taken from 18 U.S.C. § 3742 and is intended to provide substantial deference to the trial judge. Third, in cases where an adjudged offense has no sentencing parameter, or where the sentence imposed was above the applicable

sentencing parameter for the offense, the accused would be able to appeal the sentence as inappropriately severe. This provision recognizes that a sentence may be "inappropriately severe" despite being reasonable. Finally, in the case of a sentence determined by a panel in a capital case, consistent with current practice, the Court would be required to determine whether the sentence is appropriate.

Article 66(g)(3) would codify the authority of Courts of Criminal Appeals to remand a case for additional proceedings as may be necessary to address substantial issues. This authority would be subject to any limitations the Court may direct or the President may prescribe by regulation. This provision would codify current practice (i.e., *DuBay* Hearings). *See United States v. Dubay*, 37 C.M.R. 411 (1967).

In addition to the authority to review specific types of cases designated in Article 66, the Courts of Criminal Appeals consider interlocutory appeals under Article 62 and petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g.*, *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Denedo*, 556 U.S. 904 (2009). The Courts of Criminal Appeals also review cases sent to the Court by the Judge Advocate General under Article 69. Under the proposed amendments to Article 56, the Courts of Criminal Appeals also would review sentence appeals filed by the Government under Article 56(e). The procedures applicable to proceedings arising under Article 56, like the procedures applicable to proceedings arising under Article 62, Article 69, and the All Writs Act, may be set forth in the rules for the Courts of Criminal Appeals prescribed under Article 66.

Section 911 would amend Article 67, which sets forth the procedures for the Court of Appeals for the Armed Forces to review cases from the Courts of Criminal Appeals, to conform the statute to proposed changes in Articles 60 and 66, including the creation of an "entry of judgment" in the proposed Article 60c (Entry of judgment). *See* Sections 901-904, 910, *supra.* In addition, the amendments would provide for notification by a Judge Advocate General to the other Judge Advocates General prior to certifying a case for review by the Court of Appeals for the Armed Forces. The recommendation for "appropriate notification to the other Judge Advocates General" would apply only to cases the Judge Advocate General intends to certify to the Court of Appeals for the Armed Forces pursuant to Article 67(a)(2). This change is intended to ensure that each Judge Advocate General has an opportunity to provide meaningful input on the decision to appeal cases that have the potential to impact the law applicable to all the services. The change would not alter the jurisdiction of the Court of Appeals for the Armed Forces over these cases nor would it limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces.

Section 912 would make a technical amendment in Article 67a.

Section 913 would amend Article 69 to more closely align appellate review of minor offenses with the practice in the federal civilian courts. Presently, Article 69 authorizes the Judge Advocate General to conduct a post-final review of courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66 and that were not previously reviewed under Article 69. As amended, the accused would have a one-year period in which to file for review under Article 69 in the Office of the Judge Advocate General, extendable to three

years for good cause. The three-year upper limit for filing is consistent with the proposed amendments to Article 73 (Petition for a new trial) to allow an accused to petition for a new trial based on newly discovered evidence or fraud on the court. *See* Section 916, *supra*. A review under Article 69, as amended, could consider issues of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The statute would permit the accused, after a decision is issued by the Office of the Judge Advocate General, to apply for discretionary review by the Court of Criminal Appeals under Article 66. The Judge Advocate General's authority to certify cases for review at the appellate courts would be retained.

Section 914 would amend Article 70 to require, to the greatest extent practicable, at least one appellate defense counsel shall be learned in the law applicable to capital cases in any case in which the death penalty was adjudged at trial. This change would provide the accused with the same access to an expert in death penalty litigation that is currently provided to defendants in Article III courts and before military commissions under Chapter 47a of Title 10.

Section 915 would amend Article 72, which establishes the process for vacating a suspended court-martial sentence. The amendments would authorize a special court-martial convening authority to detail a judge advocate qualified under Article 27(b) to preside at the vacation hearing, which must be held before a suspended sentence can be vacated. The detailed judge advocate would replace the special court-martial convening authority at the hearing and would make factual determinations about whether a violation occurred. Under current law, the procedures applicable at vacation hearings under Article 72 are prescribed by cross-reference to R.C.M. 405, which provides the rules and procedures applicable at Article 32 hearings. The recent changes to Article 32 (Preliminary hearing) and R.C.M. 405 no longer provide a hearing structure that can be used in vacation proceedings. The implementing rules for Article 72 will be updated to reflect this change and to provide procedures applicable at vacation hearings.

Section 916 would amend Article 73 to conform the statute to the proposed changes in Article 60 and to increase the time period for an accused to petition for a new trial from two years to three years, consistent with the three-year period in Fed. R. Crim. P. 33(b)(1).

Section 917 would amend Article 75, which provides the basic rules and procedures for the restoration of a member's rights, privileges, and property when a court-martial conviction is set aside during review. As amended, the statute would authorize the President to establish regulations governing when an accused may receive pay and allowances while pending a rehearing. The implementing rules will set forth the authority to provide pay and allowances to an accused who is pending a rehearing, performing duties, and not in confinement.

Section 918 would align the language of Article 76a with proposed changes in Article 60 (Action by the Convening authority) and the proposed new Article 60c (Entry of judgment), with no substantive changes. Article 76a currently authorizes the services, at their discretion, to involuntarily place an accused on leave if the accused has been sentenced to an unsuspended punitive discharge or dismissal that has been approved by the convening authority.

TITLE X—PUNITIVE ARTICLES

Section 1001 would reorganize the punitive articles by transferring and redesignating 16 articles within Subchapter X of the UCMJ. In the context of the substantive changes in various punitive articles proposed in Title X of the bill, the reorganization of articles listed in section 1001 would serve to more closely group related offenses. The substantive amendments to the punitive articles, including the articles reorganized under Section 1001, are set forth in Sections 1002-1051.

Section 1001(1) would transfer and redesignate Articles 83 (Fraudulent enlistment, appointment, or separation) and 84 (Unlawful enlistment, appointment, or separation) as Articles 104a and 104b, respectively.

Section 1001(2) would transfer and redesignate Article 95 (Resistance, flight, breach of arrest, and escape) as Article 87a.

Section 1001(3) would transfer and redesignate Article 98 (Noncompliance with procedural rules) as Article 131f.

Section 1001(4) would transfer and redesignate Article 103 (Captured or abandoned property) as Article 108a.

Section 1001(5) would transfer and redesignate Article 104 (Aiding the enemy) as Article 103b.

Section 1001(6) would transfer and redesignate Article 105 (Misconduct as prisoner) as Article 98.

Section 1001(7) would transfer and redesignate Articles 106 (Spies) and 106a (Espionage) as Articles 103 and 103a, respectively.

Section 1001(8) would transfer and redesignate Article 113 (Misbehavior of sentinel) as Article 95.

Section 1001(9) would transfer and redesignate Article 111 (Drunken or reckless operation of a vehicle, aircraft, or vessel) as Article 113.

Section 1001(10) would transfer and incorporate Article 130 (Housebreaking) as part of the amended Article 129a.

Section 1001(11) would transfer and redesignate Article 120a (Stalking) as Article 130.

Section 1001(12) would transfer and redesignate Article 123 (Forgery) as Article 105.

Section 1001(13) would transfer and redesignate Article 124 (Maiming) as Article 128a.

Section 1001(14) would transfer and redesignate Article 132 (Frauds against the United States) as Article 124.

Section 1002 would amend Article 79 and retitle the statute as "Conviction of offense charged, lesser included offenses, and attempts." As amended, Article 79 would authorize the President to designate an authoritative, but non-exhaustive, list of lesser included offenses for each punitive article of the UCMJ in addition to judicially determined lesser included offenses. This change would provide actual notice of applicable lesser included offenses to all parties. Implementing provisions will provide the President with the flexibility to designate factually similar offenses as lesser included offenses under a "reasonably included" standard. The "reasonably included" standard would enhance actual notice by requiring a measurable relationship between the greater offense and the listed offense.

Presidentially designated lesser included offenses under Article 79 and the implementing provisions and judicially determined lesser included offenses would work in concert at trial. The statute's implementing provisions would explain to practitioners that potential lesser included offenses may be established at trial either by: (1) designation by the President; or (2) by the military judge at trial when the military judge determines that an offense raised by the evidence at trial is "necessarily included within the greater offense."

Section 1003 would amend Article 82 and retitle the statute as "Soliciting commission of offenses." The amendments would migrate the general solicitation offense under Article 134 into Article 82, as a separate subsection before the specific solicitation offenses in the existing statute. The general solicitation offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. Implementing provisions will maintain the same punishments for all solicitation offenses as under current law.

Section 1004 would transfer and redesignate Article 115 (Malingering) as Article 83, and would make a technical change to the statute's provisions. The technical change would replace the words "for the purpose of avoiding" with the words "with the intent to avoid" to better address the mens rea required for the offense.

Section 1005 would migrate the offense of "Quarantine: medical, breaking" from Article 134, the General article, to redesignated Article 84 (Breach of medical quarantine). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1006 would consolidate the offenses of "Missing movement" in existing Article 87 and "Jumping from vessel into the water" in Article 134 (the General article) into a single offense under Article 87 (Missing movement; jumping from vessel). The consolidated offense would prohibit servicemembers from, by neglect or design, missing the movement of a ship, aircraft, or unit with which they are required to move or jumping from a vessel into the water. These offenses are well-recognized concepts in military criminal law. Accordingly, they do not

need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1007 would migrate and consolidate the offenses of "Restriction, breaking" and Correctional custody – offenses against" from Article 134 (the General article) to a new section, Article 87b (Offenses against correctional custody and restriction). These offenses are well-recognized concepts in criminal law. Accordingly, they do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1008 would amend Article 89 and retitle the statute as "Disrespect toward superior commissioned officer; assault of superior commissioned officer." As amended, Article 89 would include the offense of "Assaulting a superior commissioned officer," which would be transferred from Article 90. This change would align these closely related provisions in Articles 89.

Section 1009 would amend Article 90 by transferring the offense of "Assaulting a superior commissioned officer" to Article 89 and retitling the statute as "Willfully disobeying superior commissioned officer." This change would realign closely related provisions in Articles 89 and focus the Article as amended on the willful disobedience of a lawful command of a superior commissioned officer.

Section 1010 would create a new section, Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust). The new section would provide enhanced accountability for sexual misconduct committed by recruiters and trainers during the various phases within the recruiting and basic military training environments. The term "officer" as used in subsection (a)(1) of this statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). The term "applicant for military service" would include persons in the process of applying for an original enlistment or appointment in the armed services as defined in applicable service regulations. The primary focus of the new statute is on recruiting and initial entry training. Because of the unique nature of military training and the different training environments among the services, the statute would authorize the Service Secretaries to publish regulations designating the types of physical intimacy that would constitute a "prohibited sexual activity" under subsections (a) and (b) of the new statute.

Article 93a would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense.

Article 93a is intended to address specific conduct and is not intended to supersede or preempt service regulations governing professional conduct by staff involved in recruiting, entry level training, or other follow on training programs. The Secretary concerned could prescribe by regulation any additional initial career qualification training programs related to servicemembers they determine should fall under this statute. Implementing rules will address appropriate maximum punishments for the new offense.

Section 1011 would migrate the loitering portion of the offense of "Sentinel or lookout: offenses against or by" from Article 134 (the General article) to the redesignated Article 95 (Offenses by sentinel or lookout). The wrongfulness of loitering by a sentinel or lookout is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1012 would create a new section, Article 95a (Disrespect toward a sentinel or lookout). The new statute would include the disrespect portion of the offense of "Sentinel or lookout: offenses against or by," which would be migrated from Article 134 (the General article). The offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1013 would amend Article 96 and retitle the statute as "Release of prisoner without authority; drinking with prisoner." As amended, Article 96 would include the offense of "Drinking liquor with prisoner," which would be migrated from Article 134 (the General article). The latter offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1014 would amend Article 103 (Spies), as transferred and redesignated by Section 1001(7), *supra*, by replacing the mandatory death penalty currently required with a discretionary death penalty similar to that authorized under existing Article 106a (Espionage) and for all other capital offenses under the Code.

Section 1015 would migrate the offense of "Public record: altering, concealing, removing, mutilating, obliterating, or destroying" from Article 134 (the General article) to redesignated Article 104 (Public records offenses). The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1016 would create a new section, Article 105a (False or unauthorized pass offenses). The new statute would include the offense of "False or unauthorized pass offenses," which would be migrated from Article 134 (the General article). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1017 would migrate the offense of "Impersonating a commissioned, warrant, noncommissioned, petty officer or agent of official" from Article 134 (the General article) into the redesignated Article 106 (Impersonation of officer, noncommissioned or petty officer, or agent or official). The term "officer" as used in subsection (a)(1) of the statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). This offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon the

"terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1018 would create a new section, Article 106a (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button), and would migrate the offense of "Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button" from Article 134 (the General article) into the new statute. When committed by servicemembers, the offense is a well-recognized concept in military criminal law. Accordingly, the offense does not need to rely upon proof of the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1019 would amend Article 107 and retitle the statute as "False official statements; false swearing." As amended, Article 107 would include the offense of "False swearing," which would be migrated from Article 134 (the General article). The offense of false swearing is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1020 would create a new section, Article 107a (Parole violation), and would migrate the offense of "Parole, Violation of" from Article 134 (the General article) into the new statute. This offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1021 would create a new section, Article 109a (Mail matter: wrongful taking, opening, etc.), and would migrate the offense of "Mail: taking, opening, secreting, destroying, or stealing" from Article 134 (the General article) into the new statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1022 would amend Article 110 (Improper hazarding of vessel) to also prohibit improper hazarding of an aircraft. Although other punitive articles, such as Article 92 (dereliction of duty) and Article 108 (destruction of military property) may speak to the loss or destruction of government property generally, no punitive article captures the act of improper hazarding of an aircraft, considering the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States. This amendment would align the conduct involving an aircraft with the maximum punishments authorized under Article 110.

Section 1023 would amend Article 111 and retitle the statute as "Leaving scene of vehicle accident." As amended, the statute would include the offense of "Fleeing the scene of an accident," which would be migrated from Article 134 (the General article) to place it next to other offenses under the UCMJ involving misuse of vehicles. The offense of fleeing the scene of an accident is a well-recognized concept in criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1024 would amend Article 112 and retitle the statute as "Drunkenness and other incapacitation offenses." As amended, Article 112 would include the offenses of "Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug" and "Drunk prisoner," which would be migrated from Article 134 (the General article). The express exclusion of sentinels and lookouts under Article 112 would be removed in order to resolve the ambiguity between Articles 112 and 113 concerning the "on post" status of sentinels and lookouts. The wrongfulness of being incapacitated for duty or as a prisoner is a well-recognized concept in military criminal law. Accordingly, this offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1025 would amend Article 113 (Drunken or reckless operation of vehicle, aircraft, or vessel), as transferred and redesignated by Section 1001(9), *supra*, to align the BAC limits in the offense to the prevailing legal standard in the United States. All other jurisdictions in the United States, including all fifty states, each territory, the District of Columbia, and the national parks, have established BAC limits no higher than .08 for the offense of drunk driving. The amendment also would provide flexibility for the Department of Defense to prescribe lower breath/blood alcohol limits should scientific developments or other factors in the civilian sector lead to lower limits.

Section 1026 would migrate the offenses of "Reckless endangerment," "Firearm, discharging—willfully, under such circumstances as to endanger human life," and "Weapon: concealed carrying" from Article 134 (the General article) to the redesignated Article 114 (Endangerment offenses), which currently includes the offense of "Dueling." The wrongfulness of failing to maintain weapon discipline is a well-recognized concept in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality.

Section 1027 would migrate the offenses of "Threat, communicating," and "Threat or hoax designed or intended to cause panic or public fear" from Article 134 (the General article) to the redesignated Article 115 (Communicating threats). These offenses are well-recognized concepts in criminal law. Accordingly, these offenses do not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for their criminality. The guidance in the Manual for Courts-Martial will continue to reflect the limitations on these offenses established in the applicable case law.

Section 1028 would make a technical amendment to Article 118 (Murder).

Section 1029 would create a new section, Article 119b (Child endangerment), and would migrate the offense of "Child endangerment" from Article 134 (the General article) into the new statute. The new section would align with the closely related offense of "Death or injury of an unborn child" under Article 119a. The offense of child endangerment is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal

element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1030 would amend the definition of "sexual act" in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of "sexual act" under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).

Section 1031 would redesignate Article 120a as "Mails: deposit of obscene matter" and would migrate the offense of "Mails: depositing or causing to be deposited obscene materials in" from Article 134 (the General article) into the redesignated statute. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1032 would create a new section, Article 121a (Fraudulent use of credit cards, debit cards, and other access devices). Article 121a is designed specifically to address the misuse of credit cards, debit cards, and other electronic payment technology, also known as "access devices." This article is modeled on 18 U.S.C. § 1029. It would provide a more effective and efficient means of prosecuting crimes committed with credit cards, debit cards, and other access devices than under current practice, in which such crimes are prosecuted as a larceny by false pretenses under Article 121 (Larceny and wrongful appropriation). When a government-issued credit card, debit card, or other access device is misused, the authorized sentence can be addressed in the Manual through the President's delegated powers under Article 56, which is the current sentencing approach for theft of government property under Article 121.

Section 1033 would create a new section, Article 121b (False pretenses to obtain services), and would migrate the offense of "False pretenses, obtaining services under" from Article 134 (the General article) into the new statute. This change would align the offense of false pretenses with the related UCMJ "larceny" offenses. Obtaining services by false pretenses is now well recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1034 would amend Article 122 (Robbery) to conform the statute to the offense of robbery under 18 U.S.C. § 2111. Article 122 prohibits the taking of anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a family member or others present. Article 122 would be amended to align with 18 U.S.C. § 2111 by removing the words "with the intent to steal" from the statute, thereby eliminating the requirement to show that the accused intended to permanently deprive the victim of his property. The amendments would focus the statute on the true gravamen of this offense: the forcible taking of the property by the accused from the victim, in the presence of the victim.

Section 1035 would create a new section, Article 122a (Receiving stolen property), and would migrate the offense of "Stolen property: knowingly receiving, buying, concealing) from Article 134 (the General article) into the new statute. The offense of receiving stolen property is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1036 would amend Article 123 in its entirety and retitle the statute as "Offenses concerning Government computers." The new enumerated punitive article would be similar to 18 U.S.C. § 1030 (Fraud and related activity in connection with computers). Computers are used extensively throughout the armed forces, and this proposed offense would facilitate prosecuting computer-related offenses at courts-martial. The new statute would provide a UCMJ punitive article to address computer-related offenses where the gravity of the offense may make Article 92-level punishment inappropriately low, but the misconduct may not meet the criteria of existing punitive articles such as Espionage. The new offense is modeled on 18 U.S.C. § 1030, tailored to address the needs of military justice. It would apply only to persons subject to the UCMJ, and it would be directed only at U.S. government computers and U.S. government protected information.

Article 123 would not supersede or preempt the prosecution of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, Clause 3. Further, service and DoD regulations provide a broadly applicable and flexible means to prosecute less serious computer offenses under Article 92 (Failure to obey order or regulation), and the proposed offense does not supersede or preempt those regulations. Article 108 (Military property of United States—Loss, damage, destruction, or wrongful disposition) covers computer files that have been altered or damaged by the accused through deletion or destruction of computer files or programs for purposes of the offense of willfully destroying military property.

The Manual for Courts-Martial guidance for Article 123 will define and clarify terms, including the term "with an unauthorized purpose," which includes circumstances involving more than one unauthorized purpose, as well as circumstances involving an unauthorized purpose in conjunction with an authorized purpose. The guidance also will reference the UCMJ Article 1(15) definition for "classified information," and will define "protected information" to include information that has been designated as For Official Use Only (FOUO), or as Personally Identifiable Information (PII).

Section 1037 would create a new section, Article 124a (Bribery), and would migrate the offense of bribery from Article 134 (the General article) to the new statute. Migrating the offense of bribery to the new Article 124a aligns the offense with the relocated fraud and graft offenses under the UCMJ. Bribery is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1038 would create a new section, Article 124b (Graft), and would migrate the offense of graft from Article 134 (the General article) to the new statute. Migrating the offense of graft to the new Article 124b aligns the offense with the relocated fraud and bribery offenses under the

UCMJ. Graft is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1039 would migrate the offense of "Kidnapping" from Article 134 (the General article) to the redesignated Article 125 (Kidnapping). The offense of kidnapping is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality. The removal of sodomy from Article 125 conforms the statute to the proposed treatment of the offense of forcible sodomy under Article 120 (Rape and sexual assault generally) and the proposal to provide comprehensive guidance on the treatment of animal abuse offenses, including bestiality, under Article 134.

Section 1040 would migrate the offense of "Burning with intent to defraud" from Article 134 (the General article) to redesignated Article 126 (Arson; burning property with intent to defraud). Article 126 currently prohibits the willful and malicious burning or setting on fire of a dwelling or other structure. Article 126 sets out two forms of aggravated arson and one form of simple arson. The offense of burning with intent to defraud is similar to those offenses and is itself a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1041 would amend Article 128 (Assault) to employ a standard that focuses attention on the malicious intent of the accused rather than the speculative "likelihood" of the activity actually resulting in harm, consistent with federal civilian practice.

This section also would migrate the offense of "Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking" from Article 134 (the General article) to Article 128. The offense of assault with intent to commit a serious felony is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1042 would amend Article 129 and retitle the statute as "Burglary; unlawful entry." In the amended statute, the common-law "personal dwelling" and "nighttime" elements would be removed to align Article 129 with the majority rule reflected in federal and state law. As part of the realignment of closely related offenses, the offense of "Housebreaking" would be incorporated into Article 129.

The offense of "Unlawful entry" would migrate as a separate subsection from Article 134 (the General article). Illegally accessing someone else's property is a well-recognized concept in criminal law. Accordingly, the offense of unlawful entry does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1043 would redesignate Article 120a (Stalking) as Article 130, and would update current law to address cyberstalking and threats to intimate partners. The proposed amendments would continue to address stalking activity involving a broad range of misconduct including, but not limited to, sexual offenses. The redesignated stalking statute would not preempt service regulations that specify additional types of misconduct that may be punishable at court-martial, including under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of misconduct from being prosecuted under other appropriate Articles, such as under Article 134 (General article). These uniquely military offenses are available to address similar misconduct that, for example, causes substantial emotional distress or targets professional reputation.

Section 1044 would create a new section, Article 131a (Subornation of perjury), and would migrate the offense of "Perjury: subornation of" from Article 134 (the General article) to the new statute. Migrating this offense would place it alongside similar offenses in the UCMJ. The offense of suborning perjury is a well-recognized concept in criminal law as it corrupts the trial process and interferes with the administration of justice. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1045 would create a new section, Article 131b (Obstructing justice), and would migrate the offense of "Obstructing justice" from Article 134 (the General article) to the new statute. The offense of obstructing justice is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1046 would create a new section, Article 131c (Misprision of serious offense), and would migrate the offense of "Misprision of serious offense" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1047 would create a new section, Article 131d (Wrongful refusal to testify), and would migrate the offense of "Testify: wrongful refusal" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1048 would create a new section, Article 131e (Prevention of authorized seizure of property), and would migrate the offense of "Seizure: destruction, removal, or disposal of property to prevent" from Article 134 (the General article) to the new statute. This offense is a well-recognized in criminal law. Accordingly, the offense does not rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

Section 1049 would create a new section, Article 131g (Wrongful interference with adverse administrative proceeding), and would migrate the offense of "Wrongful interference with an

adverse administrative proceeding" from Article 134 (the General article) to the new statute. The administrative proceedings addressed by this offense would include any administrative proceeding or action initiated against a servicemember that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.

If, however, a servicemember wrongfully interferes with an administrative proceeding not addressed under this offense, and that interference takes place under circumstances that are prejudicial to good order and discipline or service discrediting, the new Article 131g is not intended to preempt prosecution for wrongful interference in those other administrative proceedings under clauses 1 or 2 of Article 134.

Section 1050 would amend Article 132 in its entirety and retitle the statute as "Retaliation." This new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority. Article 132 would not preempt service regulations that specify additional types of retaliatory conduct that may be punishable at court-martial under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under other appropriate Articles, such as Article 109 (destruction of property), Article 93 (Cruelty and maltreatment), Article 128 (Assault), Article 131b (Obstructing justice), Article 130 (Stalking), or Article 134 (General article).

Section 1051 would amend Article 134, the General article, to cover all non-capital federal crimes of general applicability under clause 3, regardless of where the federal crime is committed. This change would make military practice uniform throughout the world and would better align it with the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261.

Section 1052 provides the amended table of sections for the beginning of Subchapter X, the punitive articles, reflecting all proposed new sections and proposed amendments to section headings.

TITLE XI—MISCELLANEOUS PROVISIONS

Section 1101 would amend Article 135 (Courts of inquiry) to provide individuals employed by the Department of Homeland Security, the department under which the Coast Guard operates, the right to be designated as parties in interest when they have a direct interest in the subject of a court of inquiry convened under Article 135. This change would align the rights of employees of the Department of Homeland Security with the rights of employees of the Department of Defense, ensuring consistent application of this statute for all military services.

Section 1102 would make a technical amendment to Article 136 (Authority to administer oaths and to act as notary) to remove from the section heading the authority to act as a notary, which is not provided for in the text of the statute.

Section 1103 would amend Article 137 (Articles to be explained) to require that officers, in addition to enlisted personnel, receive training on the UCMJ upon entry to service, and periodically thereafter. The amendments would provide for specific military justice training for military commanders and convening authorities, and would require the Secretary of Defense to prescribe regulations for additional specialized training on the UCMJ for combatant commanders and commanders of combined commands. Article 137(d), as amended, would require the Secretary of Defense to maintain an electronic version of the UCMJ and Manual for Courts-Martial that would be updated periodically and made available on the Internet for review by servicemembers and the public.

*Section 1104(*a) would create a new section, Article 140a (Case management; data collection, and accessibility), which would require the Secretary of Defense to prescribe uniform standards and criteria for case processing and management, military justice data collection, production and distribution of records of trial, and access to case information. The purpose of this section is to enhance the management of cases, the collection of data necessary for evaluation and analysis, and to provide appropriate public access to military justice information at all stages of court-martial proceedings. At a minimum, the system developed for implementation should permit timely and appropriate access to filings, objections, instructions, and judicial rulings at the trial and appellate level, and to actions at trial and in subsequent proceedings concerning the findings and sentences of courts-martial.

Section 1104(b) provides the timeline for implementation of Section 1104(a). In order to provide appropriate time for implementation, this section would require promulgation of standards by the Secretary of Defense not later than two years after enactment of Section 1104, with an effective date for such standards not later than four years after enactment.

TITLE XII—MILITARY JUSTICE REVIEW PANEL AND ANNUAL REPORTS

Section 1201 would amend Article 146 (Code committee) and retitle the statute as "Military Justice Review Panel." The Military Justice Review Panel would replace the Code Committee. The Military Justice Review Panel would be an independent, blue ribbon panel of experts tasked to conduct a periodic evaluation of military justice practices and procedures on a regular basis, thereby enhancing the efficiency and effectiveness of the UCMJ and the Code's implementing regulations.

The proposed Military Justice Review Panel would be composed of thirteen members. Each of the following officials would select one person to serve on the Panel: the Secretary of Defense (in consultation with the Secretary of Homeland Security), the Attorney General, the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps. The remaining members of the Panel would be selected by the Secretary of Defense based upon the recommendations of each of the following: the chairman and ranking minority member of the House Armed Services Committee and the Senate Armed Services Committee, the Chief Justice of the United States, and the Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Secretary of Defense would designate one member as the Chair; the Panel would have a full-time staff.

The Panel would issue its first report four years after the effective date of the legislation, focusing on the implementation of any recent amendments to the UCMJ and Manual for Courts-Martial. Eight years after the effective date of the legislation, the Panel would issue its first comprehensive review of the UCMJ and Manual for Courts-Martial. Thereafter, the Panel would issue comprehensive reports every eight years. Within each eight year cycle, the Panel would issue targeted reports at the mid-point of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress.

This proposal is based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice. Accordingly, the comprehensive reviews are scheduled on an eight-year schedule.

This proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.

Section 1202 would create a new section, Article 146a (Annual reports), to retain the valuable informational aspects of the annual reports issued individually by the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps. The proposal anticipates that the individual reports will be compiled into a single volume using the procedures currently employed to combine individual reports into a consolidated report under the present version of Article 146.

TITLE XIII—CONFORMING AMENDMENTS AND EFFECTIVE DATES

Section 1301 contains 25 conforming amendments to the tables of sections necessitated by proposed amendments to section titles.

Section 1302 establishes the effective date of amendments contained in the legislation. The amendments would become effective on the first day of the first month that begins a year after enactment, subject to exceptions for ongoing proceedings, prior offenses, and specific effective dates within the bill.

Appendices

APPENDIX A:
Memorandum from Chairman of the Joint Chiefs Of Staff General Martin E. Dempsey of August 5, 2013, to Secretary Of Defense Chuck Hagel Requesting a Review of the Uniform Code of Military Justice

[redacted]

OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, DC 20318-9999

CM-0210-13
5 August 2013

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: (U) Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice

1. [redacted] During a recent Tank session on Sexual Assault Prevention and Response, the Joint Chiefs of Staff (JCS) discussed the current state of the military justice system.

2. [redacted] The U.S. Armed Forces operated under the Articles of War from 1775 until 1950. In 1950, President Truman signed the first Uniform Code of Military Justice (UCMJ) into law. We noted that the last comprehensive review and update of the UCMJ took place in 1984. Much has changed since then, to include the end of the Cold War, the successful integration of the All-Volunteer Force, and the enactment of the Goldwater-Nichols Act of 1986. The JCS concluded that, given the changes in the force and society since 1984, a DOD-led holistic review of the UCMJ and the military justice system would be appropriate.

3. [redacted] Accordingly, the JCS and I recommend that you direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ and the military justice system. This proposal should not be taken to signal a sense among the JCS that the UCMJ has proved inadequate to its purpose, or as a measure intended to forestall criticism of the manner in which any case or cases are handled within the military justice system. The review is solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline. The JCS recognizes that such a review would be broader than the work ongoing with the 576 Response Systems Panel and that the Services will need to support this holistic review by providing military justice experts for extended periods of time.

MARTIN E. DEMPSEY
General, USA
Chairman of the Joint Chiefs of Staff

2504-14

SIGNED

[redacted]

OSD009257-13

APPENDIX B:
Memorandum from Secretary Hagel of October 18, 2013, Directing the General Counsel of the Department Of Defense to Conduct a Comprehensive Review of the Uniform Code of Military Justice

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

OCT 18 2013

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEFS OF THE MILITARY SERVICES
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT

SUBJECT: Comprehensive Review of the Uniform Code of Military Justice

As proposed by the Chairman of the Joint Chiefs of Staff and the other members of the Joint Chiefs, I direct the General Counsel to conduct a comprehensive review of the Uniform Code of Military Justice (UCMJ) and the military justice system with support from military justice experts provided by the Services.

Such a comprehensive review is appropriate given the many amendments to the UCMJ since the Military Justice Act of 1983 and to the Manual for Courts-Martial (MCM) since 1984. The review should include an analysis of not only the UCMJ, but also its implementation through the MCM and Service regulations. The review should consider any report and recommendations issued by the Response Systems Panel. I direct that a report including a recommendation for any appropriate amendments to the UCMJ be submitted within 12 months and that a second report recommending any appropriate amendments to the MCM be submitted within 18 months. The General Counsel will submit an Issue Nomination to the Director, Cost Assessment and Program Evaluation, describing the additional resources necessary for this review.

Chuck Hagel

OSD009257-13

APPENDIX C:
Terms of Reference with Addendum dated March 12, 2014

Terms of Reference

for

Military Justice Review Committee

January 2014

1. Objectives and Scope. These Terms of Reference set forth the objectives for the Secretary of Defense-directed comprehensive review of the military justice system, including the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial (MCM), and implementing Service regulations. The review will be conducted by the Military Justice Review Committee (MJRC). The MJRC will submit a report including recommended UCMJ amendments no later than October 20, 2014. The MJRC will submit a second report including recommended MCM amendments no later than April 20, 2015.

2. Background.

a. The last time our system of military justice underwent a comprehensive review was in 1984. That was before passage of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, which resulted in fundamental changes to the organization of the Department of Defense and the operation of U.S. military forces. It was also before the terrorist attacks of 9/11, years of ensuing armed conflict, and the current security environment. Indeed, much has changed over the past 30 years, from advancements in information and communications technologies to efforts to address issues related to gender, sexual orientation and sexual assault. While there have been numerous amendments to the Uniform Code of Military Justice in response to discrete challenges, it has been a very long time since the Department has undertaken to examine and update the Code in a systematic fashion.

b. A comprehensive review of the military justice system was proposed by the Chairman of the Joint Chiefs of Staff and the other members of the Joint Chiefs in an August 5, 2013, memorandum to the Secretary of Defense. This memorandum stated, in part, that "the Services will need to support this holistic review by providing military justice experts for extended periods of time."

c. On September 18, 2013, the Acting General Counsel recommended that the Secretary of Defense direct the General Counsel to conduct a comprehensive review of the military justice system with support from military justice experts provided by the Services. The Acting General Counsel estimated that such a review "would require a budget estimated at $2.35 to $2.95 million over the review's 18-month timespan and would require extensive ongoing internal coordination among the Military Departments and external coordination with the Department of Homeland Security." The Acting General Counsel also noted that the Services have a limited ability to contribute personnel due to increased demands on their military justice resources and severe financial constraints affecting the Services. As a result, conducting a comprehensive review of the military justice system "may require extensive use of DoD civilian attorneys (including new hires)."

d. Along with his recommendation, the Acting General Counsel submitted a budget justification to the Secretary of Defense that outlined the estimated costs and requirements for the proposed review, to include numbers of personnel and their qualifications. The budget justification assumed a staff of 22 DoD personnel (the Coast Guard would be invited to provide up to three additional personnel). The budget justification also proposed that any new hires from outside the government, including the project's director, would be hired as full-time Highly Qualified Experts (HQE), and that the MJRC's staff would be co-located.

e. On October 18, 2013, the Secretary of Defense directed the General Counsel "to conduct a comprehensive review of the Uniform Code of Military Justice (UCMJ) and military justice system with support from military justice experts provided by the Services." He directed that the review include "an analysis of not only the UCMJ, but also its implementation through the [Manual for Courts-Martial (MCM)] and Service regulations." He further directed that "a report including a recommendation for any appropriate amendments to the UCMJ be submitted within 12 months and that a second report recommending any appropriate amendments to the MCM be submitted within 18 months."

3. Committee and Advisors.

a. **MJRC Chairman.** The General Counsel will designate a Chairman of the MJRC. That Chairman will be a civilian employee of the United States Government and may be hired for that purpose as an HQE or in another appropriate status. The Chairman will perform his duties subject to the direction of the General Counsel.

b. **MJRC Members.** The General Counsel will designate the members of the MJRC, who will be either civilian employees of the United States Government or military personnel. Each Military Service within DoD will nominate at least one military justice expert in the grade of O-6 or O-5, two judge advocates in the grade of O-4 or O-3, and one enlisted member in the grade of E-5 or higher with an MOS or AFSC in the legal field to be detailed to the MJRC. The Coast Guard will be invited to nominate a military justice expert in the grade of O-6 or O-5 and one or two judge advocates in the grade of O-4 or O-3 to be detailed to the MJRC. Non-judge advocate military personnel and/or retired military personnel (who will be recalled to active duty or employed as HQEs or in another appropriate civilian status) may also be designated as members of the MJRC. An attorney in the Office of the Deputy General Counsel (Personnel & Health Policy) will serve as Staff Director of the MJRC.

c. **Senior Advisors.** The General Counsel may appoint one or more Senior Advisors to support the MJRC. Such a Senior Advisor may be hired for that purpose as an HQE or provided another appropriate status. If one or more of those Senior Advisors is not a full-time government employee or permanent

part-time employee, he or she will be consulted on an individual basis only. The Chairman will consult with any such Senior Advisors as the Chairman deems appropriate.

d. **Department of Justice Advisor**. The General Counsel of the Department of Defense will request the Department of Justice to designate an advisor to the MJRC who is an expert in the litigation of criminal trials in United States district courts.

4. Guiding Principles. The MJRC will apply the following guiding principles to the comprehensive review:

a. Use the current UCMJ as a point of departure for a baseline reassessment.

b. Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.

c. To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the Military Services.

d. Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel established under Section 576 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632, 1760 (2013).

e. Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.

5. Process.

a. The MJRC will consider such information and perform such analysis as it deems appropriate. The expectation is that the judge advocates on the MJRC will have experience as military judges, prosecutors, defense counsel, and victim's counsel, or access to others in their organizations with those perspectives. They may also draw on their experience as staff judge advocates advising military commanders as convening authorities. In addition, at a point in the review process where the Chairman believes it would be most useful, the MJRC will solicit the views of general and flag officers with experience as general court-martial convening authorities. The Chairman may ask the Legal Counsel to the Chairman of the Joint Chiefs of Staff (CJCS Legal Counsel) to assist in convening a meeting or meetings with a suitable group of officers for this purpose.

b. The MJRC will coordinate proposed amendments to either the UCMJ or MCM on an ongoing "rolling" basis. The goal of this coordination process will be to achieve consensus on proposed reforms or identify points of disagreement, so that the MJRC will know whether a proposal has been accepted or rejected before dealing with other UCMJ articles or MCM provisions that may be affected by that proposal.

c. The Chairman has the sole discretion and authority to forward any proposal for coordination. Such coordination will be with the Deputy General Counsel (Personnel & Health Policy), the Judge Advocates General of the Army, Navy, Air Force, and Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and the CJCS Legal Counsel. The Chairman will determine the frequency and level of detail with which such proposals will be forwarded for coordination. The Chairman may group related proposed changes for this coordination process. The Chairman should exercise this discretion in a manner that will allow final decisions to be made on major reform proposals at an early point in the review process.

d. A failure to concur or non-concur within seven duty days of receipt of a request for concurrence will be deemed to be a concurrence unless, upon request, the Chairman extends the period for concurrence. Any proposal that does not receive unanimous concurrence or non-concurrence will be presented to the General Counsel of the Department of Defense, and, as appropriate, via the General Counsel to the Secretary of Defense or Deputy Secretary of Defense for resolution.

6. Suspense Dates The MJRC will submit to the General Counsel a report including recommended UCMJ amendments no later than September 22, 2014. The MJRC will submit to the General Counsel a second report including recommended MCM amendments no later than March 20, 2015.

7. Support.

a. The members of the MJRC will be co-located at One Liberty Center, 875 North Randolph Street, Arlington, VA 22203.

b. The Office of General Counsel will coordinate human resources, office/facilities, and other support for the MJRC.

c. The Military Departments and other DoD Components will provide full support to the MJRC with detailed personnel, information (including but not limited to review of documents and interviews of personnel), analytical capacity as determined necessary, and any other support as requested.

Approved: _____
Stephen W. Preston, General Counsel, DoD

Date: 24 January 2014

Addendum to the January 24, 2014 "Terms of Reference for Military Justice Review Committee"

1. The name of the organization conducting the Secretary of Defense-directed comprehensive review of the military justice system is the Military Justice Review Group. That word "Group" is substituted for the word "Committee" at each point the latter appears in the January 24, 2014 Terms of Reference. The abbreviation "MJRG" is substituted for "MJRC" at each point the latter appears in the January 24, 2014 Terms of Reference.

2. The title of the head of the Military Justice Review Group is Director. The word "Director" is substituted for "Chairman" at each point the latter appears in paragraphs 3, 5.c., and 5.d of the January 24, 2014 Terms of Reference. Paragraph 5.a is revised to read as follows:

a. The MJRG will consider such information and perform such analysis as it deems appropriate. The expectation is that the judge advocates on the MJRG will have experience as military judges, prosecutors, defense counsel, and victim's counsel, or access to others in their organizations with those perspectives. They may also draw on their experience as staff judge advocates advising military commanders as convening authorities. In addition, at a point in the review process where the Director believes it would be most useful, the MJRG will consult with general and flag officers who have had experience as general court-martial convening authorities. The Director may ask the Legal Counsel to the Chairman of the Joint Chiefs of Staff (CJCS Legal Counsel) to assist in convening a meeting or meetings with a suitable group of officers for this purpose.

Approved: _____
Stephen W. Preston, General Counsel, DoD

Date: 3/12/14

APPENDIX D:
Military Justice Review Group Staff Members

Director

Honorable Andrew S. Effron
Former Chief Judge, U.S. Court of Appeals
for the Armed Forces

Executive Secretariat

Staff Directors

Lieutenant Colonel Charles C. Hale
U.S. Marine Corps
(from January 2015)

Mr. David J. Gruber
Captain, U.S. Navy (Retired)
(December 2013 - January 2015)

Attorney Advisors/Special Assistants

Mr. David P. Bennett
DoD Office of the General Counsel

Mr. Andrew S. Williams
Colonel, U.S. Air Force (Retired)

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APPENDIX E: Article Comparison Tables

Table 1: Current/Proposed Article Designations and Titles

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 1 — Definitions	Same
Article 2 — Persons subject to this chapter	Same
Article 3 — Jurisdiction to try certain personnel	Same
Article 4 — Dismissed officer's right to trial by court-martial	Same
Article 5 — Territorial applicability of this chapter	Same
Article 6 — Judge advocates and legal officers	Same
Article 6a — Investigation and disposition of matters pertaining to the fitness of military judges	Same
Article 6b — Rights of the victim of an offense under this chapter	Same
Article 7 — Apprehension	Same
Article 8 — Apprehension of deserters	Same
Article 9 — Imposition of restraint	Same
Article 10 — Restraint of persons charged with offenses	Same
Article 11 — Reports and receiving of prisoners	Same
Article 12 — Confinement with enemy prisoners prohibited	Same *(Prohibition of confinement of armed forces members with enemy prisoners and certain others)*
Article 13 — Punishment prohibited before trial	Same
Article 14 — Delivery of offenders to civil authorities	Same
Article 15 — Commanding Officer's non-judicial punishment	Same
Article 16 — Courts-martial classified	Same
Article 17 — Jurisdiction of courts-martial in general	Same
Article 18 — Jurisdiction of general courts-martial	Same
Article 19 — Jurisdiction of special courts-martial	Same
Article 20 — Jurisdiction of summary courts-martial	Same
Article 21 — Jurisdiction of courts-martial not exclusive	Same
Article 22 — Who may convene general courts-martial	Same
Article 23 — Who may convene special courts-martial	Same
Article 24 — Who may convene summary courts-martial	Same
Article 25 — Who may serve on courts-martial	Same
Article 25a — Number of members in capital cases	Same *(Number of court-martial members in capital cases)*
Article 26 — Military judge of a general or special court-martial	Same
Article 27 — Detail of trial counsel and defense counsel	Same
Article 28 — Detail or employment of reporters and interpreters	Same
Article 29 — Absent and additional members	Same *(Assembly and impaneling of members; detail of new members and military judges)*
Article 30 — Charges and specifications	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 31 — Compulsory self-incrimination prohibited	Same
Article 32 — Preliminary Hearing	Same *(Preliminary hearing required before referral to general court-martial)*
Article 33 — Forwarding of charges	*Move requirement to Art.10, strike this article*
Article 34 — Advice of staff judge advocate and reference for trial	Same *(Advice to convening authority before referral for trial)*
Article 35 — Service of charges	Same *(Service of charges; commencement of trial)*
Article 36 — President may prescribe rules	Same
Article 37 — Unlawfully influencing action of court	Same
Article 38 — Duties of trial counsel and defense counsel	Same
Article 39 — Sessions	Same
Article 40 — Continuances	Same
Article 41 — Challenges	Same
Article 42 — Oaths	Same
Article 43 — Statute of limitations	Same
Article 44 — Former jeopardy	Same
Article 45 — Pleas of the accused	Same
Article 46 — Opportunity to obtain witnesses and other evid.	Same
Article 47 — Refusal to appear or testify	Same *(Refusal of person not subject to this chapter to appear, testify, or produce evid.)*
Article 48 — Contempts	Same
Article 49 — Depositions	Same
Article 50 — Admissibility of records of courts of inquiry	Same
Article 50a — Defense of lack of mental responsibility	Same
Article 51 — Voting and rulings	Same
Article 52 — Number of votes required	Same *(Votes required for conviction, sentencing, and other matters)*
Article 53 — Court to announce action	Same *(Findings and sentencing)*
Article 54 — Record of trial	Same
Article 55 — Cruel and unusual punishments prohibited	Same
Article 56 — Maximum and minimum limits	Same *(Sentencing)*
Article 56a — Sentence of confinement for life w/o parole	*Move requirement to Article 56, strike this article*
Article 57 — Effective date of sentences	Same
Article 57a — Deferment of sentences	*Move requirement to Article 57, strike this article*
Article 58 — Execution of confinement	Same
Article 58a — Sentences: red. in enlisted grade upon approval	Same
Article 58b — Sentences: forfeiture of pay during confinement	Same
Article 59 — Error of law; lesser included offense	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 60 — Action by the Convening authority	Same *(Post-trial processing in general and special courts-martial." Some requirements moved to new Arts. 60a, 60b, 60c, and 53a)*
Article 61 — Waiver or withdrawal of appeal	Same *(Waiver of right to appeal; withdrawal of appeal)*
Article 62 — Appeal by the United States	Same
Article 63 — Rehearings	Same
Article 64 — Review by a judge advocate	Same *(Judge advocate review of finding of guilty in summary court-martial)*
Article 65 — Disposition of records	Same *(Transmittal and review of records)*
Article 66 — Review by Court of Criminal Appeals	Same *(Courts of Criminal Appeals)*
Article 67 — Review by the Court of Appeals for the Armed Forces	Same
Article 67a — Review by the Supreme Court	Same
Article 68 — Branch offices	Same
Article 69 — Review in the office of the Judge Advocate General	Same *(Review by Judge Advocate General)*
Article 70 — Appellate counsel	Same
Article 71 — Execution of sentence; suspension of sentence	*Move requirement to Article 57, strike this article*
Article 72 — Vacation of suspension	Same
Article 73 — Petition for a new trial	Same
Article 74 — Remission and suspension	Same
Article 75 — Restoration	Same
Article 76 — Finality of proceedings, findings, and sentences	Same
Article 76a — Leave required to be taken pending review of convictions	Same
Article 76b — Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment	Same
Article 77 —Principals	Same
Article 78 —Accessory after the fact	Same
Article 79 —Conviction of lesser included offense	Same *(Conviction of offense charged, lesser included offenses, and attempts)*
Article 80 —Attempts	Same
Article 81 —Conspiracy	Same
Article 82 —Solicitation	Same *(Soliciting commission of offenses)*
Article 83 —Fraudulent enlistment, appointment, or separation	*Article 104a*
Article 84 —Unlawful enlistment, appointment, or separation	*Article 104b*
Article 85 —Desertion	Same
Article 86 —Absence without leave	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 87 —Missing movement	Same *(Missing movement; jumping from vessel)*
Article 88 —Contempt toward officials	Same
Article 89 —Disrespect toward a superior commissioned officer	Same *(Disrespect toward/ assault of a superior commissioned officer)*
Article 90 —Assaulting or willfully disobeying superior commissioned officer	Same *(Willfully disobeying superior commissioned officer)*
Article 91 —Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	Same
Article 92 —Failure to obey order or regulation	Same
Article 93 —Cruelty and maltreatment	Same
Article 94 —Mutiny or sedition	Same
Article 95 —Resistance, flight, breach of arrest, and escape	*Article 87a*
Article 96 —Releasing prisoner without proper authority	Same
Article 97 —Unlawful detention	Same
Article 98 —Noncompliance with procedural rules	*Article 131f*
Article 99 —Misbehavior before the enemy	Same
Article 100 —Subordinate compelling surrender	Same
Article 101 —Improper use of countersign	Same
Article 102 —Forcing a safeguard	Same
Article 103 —Captured or abandoned property	*Article108a*
Article 104 —Aiding the enemy	*Article 103b*
Article 105 —Misconduct as prisoner	*Article 98*
Article 106 —Spies	*Article 103*
Article 106a —Espionage	*Article 103a*
Article 107 —False official statements	Same
Article 108 —Military property of the U.S.—sale, loss, damage	Same
Article 109 —Property other —waste, spoilage, or destruction	Same
Article 110 —Improper hazarding of vessel	Same *(Improper hazarding of vessel or aircraft)*
Article 111 —Drunken or reckless operation of vehicle , aircraft, or vessel	*Article 113*
Article 112 —Drunk on duty	Same *(Drunkenness and other incapacitation offenses)*
Article 112a —Wrongful use, possession, etc., of controlled substances	Same
Article 113 —Misbehavior of sentinel	*Article 95 (Offenses of sentinel or lookout)*
Article 114 —Dueling	Same *(Endangerment offenses)*
Article 115 —Malingering	*Article 83*
Article 116 —Riot or breach of peace	Same
Article 117 —Provoking speeches or gestures	Same
Article 118 —Murder	Same
Article 119 —Manslaughter	Same
Article 119a —Death or injury of an unborn child	Same

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 120 —Rape and sexual assault generally	Same
Article 120a —Stalking	*Art. 130*
Article 120b —Rape and sexual assault of a child	Same
Article 120c —Other sexual misconduct	Same
Article 121 —Larceny and wrongful appropriation	Same
Article 122 —Robbery	Same
Article 123 —Forgery	*Article 105*
Article 123a —Making, drawing, or uttering check, draft, etc.	Same
Article 124 —Maiming	*Article 128a*
Article 125 —Forcible sodomy; bestiality	*Forcible sodomy - Art. 120 (Rape and sexual assault generally); Bestiality - Art. 134 (Animal abuse)*
Article 126 —Arson	Same *(Arson; burning with intent to defraud)*
Article 127 —Extortion	Same
Article 128 —Assault	Same
Article 129 —Burglary	Same *(Burglary;unlawful entry)*
Article 130 —Housebreaking	*Article 129*
Article 131 —Perjury	Same
Article 132 —Frauds against the United States	*Article 124*
Article 133 —Conduct unbecoming an officer and gentleman	Same
Article 134 —General article	Same
Article 134 —Abusing public animal	Same, subject to Part II review
Article 134 —Adultery	Same, subject to Part II review
Article 134 —Assault—with intent to commit offenses	*Article 128*
Article 134 —Bigamy	Same, subject to Part II review
Article 134 —Bribery and graft	*Articles 124a & 124b*
Article 134 —Burning with intent to defraud	*Article 126*
Article 134 —Check, worthless—making and uttering	Same, subject to Part II review
Article 134 —Child endangerment	*Article 119b*
Article 134 —Child pornography	Same, subject to Part II review
Article 134 —Cohabitation, wrongful	*Art. 134, subject to Part II rev.*
Article 134 —Correctional custody—offenses against	*Article 87b*
Article 134 —Debt, dishonorably failing to pay	Same, subject to Part II review
Article 134 —Disloyal statements	Same, subject to Part II review
Article 134 —Disorderly conduct, drunkenness	Same, subject to Part II review
Article 134 —Drinking liquor with prisoner	*Article 96*
Article 134 —Drunk prisoner	*Article 112*
Article 134 —Drunkenness—incapacitation for duties	*Article 112*
Article 134 —False or unauthorized pass offenses	*Article 105a*
Article 134 —False pretenses, obtaining services under	*Article 121b*
Article 134 —False swearing	*Article 107*
Article 134 —Firearm, discharging—through negligence	Same, subject to Part II review
Article 134 —Firearm, discharging - willful	*Article 114*
Article 134 —Fleeing scene of accident	*Article 111*

Designation and Title in Current UCMJ	Designation and Title in Proposed UCMJ
Article 134 —Fraternization	Same, subject to Part II review
Article 134 —Gambling with subordinate	Same, subject to Part II review
Article 134 —Homicide, negligent	Same, subject to Part II review
Article 134—Impersonating a commissioned officer, warrant, etc	*Article 106*
Article 134 —Indecent language	Same, subject to Part II review
Article 134 —Jumping from vessel into the water	*Article 87*
Article 134 —Kidnapping	*Article 125*
Article 134 —Mail: taking, opening, secreting, etc.	*Article 109a*
Article 134 —Mails: depositing or causing to be deposited obscene matters in	*Article 120a*
Article 134 —Misprision of serious offense	*Article 131c*
Article 134 —Obstructing justice	*Article 131b*
Article 134 —Wrongful interference with adverse admin. proc.	*Article 131g*
Article 134 —Pandering and prostitution	Same, subject to Part II review
Article 134 —Parole, Violation of	*Article 107a*
Article 134 —Perjury: subornation of	*Article 131a*
Article 134 —Public record: altering, concealing, etc.	*Article 104*
Article 134 —Quarantine: medical, breaking	*Article 84*
Article 134 —Reckless endangerment	*Article 114*
Article 134 —Restriction, breaking	*Article 87b*
Article 134 —Seizure: destruction, removal, or disposal of prop.	*Article 131e*
Article 134 —Self-injury without intent to avoid service	Same, subject to Part II review
Article 134 —Sentinel or lookout: offenses against or by	*Article 95*
Article 134 —Soliciting another to commit an offense	*Article 82*
Article 134 —Stolen property: knowingly receiving, buying, etc.	*Article 122a*
Article 134 —Straggling	Same, subject to Part II review
Article 134 —Testify: wrongful refusal	Article 131g
Article 134 —Threat or hoax - panic or public fear	*Article 115*
Article 134 —Threat, communicating	*Article 115*
Article 134 —Unlawful entry	*Article 129*
Article 134 —Weapon: concealed, carrying	*Article 114*
Article 134 —Wearing unauthorized insignia	*Article 106a*
Article 135 —Courts of inquiry	Same
Article 136 —Authority to administer oaths and to act as notary	Same *(Auth. to admin. oaths)*
Article 137 —Articles to be explained	Same
Article 138 —Complaints of wrongs	Same
Article 139 —Redress of injuries to property	Same
Article 140 —Delegation by the President	Same
Article 141 —Status	Same
Article 142 —Judges	Same
Article 143 —Organization and employees	Same
Article 144 —Procedure	Same
Article 145 —Annuities for judges and survivors	Same
Article 146 — Code committee	Same *(Military Justice Review Panel)*

Proposed New Articles
Article 26a – Military Magistrates
Article 30a – Proceedings Conducted Before Referral
Article 33 – Disposition Guidance
Article 53a – Plea Agreements
Article 60a – Limited authority to act on the sentence in specified post-trial circumstances
Article 60b – Post-trial actions in summary courts-martial and certain general and special courts-martial
Article 60c – Entry of judgment
Article 87a – Resistance, flight, breach of arrest, and escape
Article 87b – Correctional custody offenses
Article 93a – Prohibited activities with military recruit or trainee by person in position of special trust
Article 103a – Espionage
Article 103b – Aiding the enemy
Article 104a – Fraudulent Enlistment, Appointment, or Separation
Article 104b – Unlawful Enlistment, Appointment, or Separation
Article 105a – False or unauthorized pass offenses
Article 107a – Parole violation
Article 108a – Captured, abandoned property; failure to secure, etc.
Article 109a – Mail: taking, opening, secreting, destroying or stealing
Article 119b – Child endangerment
Article 121a – Unauthorized use of credit cards, debit cards, and access devices
Article 121b – False pretenses, obtain services under
Article 122a – Stolen property: knowingly receiving, buying
Article 123 – Offenses concerning Government computers
Article 124a – Bribery
Article 124b – Graft
Article 125 – Kidnapping
Article 128a – Maiming
Article 131a – Subornation of Perjury
Article 131b – Obstruction of justice
Article 131c – Misprision of serious offense
Article 131d – Wrongful refusal to testify
Article 131e – Prevention of authorized seizure of property
Article 131f – Noncompliance with procedural rules, etc.
Article 131g – Wrongful interference with an adverse administrative proceeding
Article 132 – Retaliation
Article 140a – Case management; data collection and accessibility
Article 146a – Annual reports

Table 2: Proposed/Current Article Designations and Titles

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 1 —Definitions	Same
Article 2 —Persons subject to this chapter	Same
Article 3 —Jurisdiction to try certain personnel	Same
Article 4 —Dismissed officer's right to trial by court-martial	Same
Article 5 —Territorial applicability of this chapter	Same
Article 6 —Judge Advocates and legal officers	Same
Article 6a —Investigation and disposition of matters pertaining to the fitness of military judges	Same
Article 6b —Rights of the victim of an offense under this chapter	Same
Article 7 —Apprehension	Same
Article 8 —Apprehension of deserters	Same
Article 9 —Imposition of restraint	Same
Article 10 —Restraint of persons charged	Same
Article 11 —Reports and receiving of prisoners	Same
Article 12 — Prohibition of confinement of armed forces members with enemy prisoners and certain others	Same *(Confinement with enemy prisoners prohibited)*
Article 13 —Punishment prohibited before trial	Same
Article 14 —Delivery of offenders to civil authorities	Same
Article 15 —Commanding Officer's non-judicial punishment	Same
Article 16 —Courts-martial classified	Same
Article 17 —Jurisdiction of courts-martial in general	Same
Article 18 —Jurisdiction of general courts-martial	Same
Article 19 —Jurisdiction of special courts-martial	Same
Article 20 —Jurisdiction of summary courts-martial	Same
Article 21 —Jurisdiction of courts-martial not exclusive	Same
Article 22 —Who may convene general courts-martial	Same
Article 23 —Who may convene special courts-martial	Same
Article 24 —Who may convene summary courts-martial	Same
Article 25 —Who may serve on courts-martial	Same
Article 25a —Number of court-martial members in capital cases	Same *(Number of members in capital cases)*
Article 26 —Military judge of a general or special court-martial	Same
Article 26a —Military magistrates	*New article*
Article 27 —Detail of trial counsel and defense counsel	Same
Article 28 —Detail or employment of reporters and Interpreters	Same
Article 29 —Assembly and impaneling of members; detail of new members and military judges	Same *(Absent and additional members)*
Article 30 —Charges and specifications	Same
Article 30a —Proceedings conducted before referral	*New article*
Article 31 —Compulsory self-incrimination prohibited	Same
Article 32 —Preliminary hearing required before referral to general court-martial	Same *(Preliminary hearing)*

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 33 —Disposition guidance	*New article*
Article 34 —Advice to convening authority before referral for trial	Same *(Advice of staff judge advocate and reference for trial)*
Article 35 —Service of charges; commencement of trial	Same *(Service of charges)*
Article 36 —President may prescribe rules	Same
Article 37 —Unlawfully influencing action of court	Same
Article 38 —Duties of trial counsel and defense counsel	Same
Article 39 —Sessions	Same
Article 40 —Continuances	Same
Article 41 —Challenges	Same
Article 42 —Oaths	Same
Article 43 —Statute of limitations	Same
Article 44 —Former jeopardy	Same
Article 45 —Pleas of the accused	Same
Article 46 —Opportunity to obtain witnesses and other evidence	Same
Article 47 —Refusal of person not subject to this chapter to appear, testify, or produce evidence	Same *(Refusal to appear or testify)*
Article 48 —Contempts	Same
Article 49 —Depositions	Same
Article 50 —Admissibility of records of courts of inquiry	Same
Article 50a —Defense of lack of mental responsibility	Same
Article 51 —Voting and rulings	Same
Article 52 —Votes required for conviction, sentencing, and other matters	Same *(Number of votes required)*
Article 53 —Findings and sentencing	Same *(Court to announce action)*
Article 53a —Plea Agreements	*New article*
Article 54 —Record of trial	Same
Article 55 —Cruel and unusual punishments prohibited	Same
Article 56 —Sentencing	*Replacing old Article 56—Maximum and Minimum Limits*
Article 57 —Effective date of sentences	*Same, incorporating Arts. 57a and 71*
Article 58 —Execution of confinement	Same
Article 58a —Sentences: reduction in enlisted grade upon approval	Same
Article 58b —Sentences: forfeiture of pay during confinement	Same
Article 59 —Error of law; lesser included offense	Same
Article 60 —Post-trial processing in general and special courts-martial	*Replacing old Article 60—Action by the convening authority*
Article 60a —Limited authority to act in specified post-trial circumstances	*New article*
Article 60b—Post-trial actions in summary courts-martial and certain general and special courts-martial	*New article*

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 60c—Entry of judgment	*New article*
Article 61 —Waiver of right to appeal; withdrawal of appeal	Same *(Waiver or withdrawal of appeal)*
Article 62 —Appeal by the United States	Same
Article 63 —Rehearings	Same
Article 64 —Judge advocate review of finding of guilty in summary court-martial	Same *(Review by a judge advocate)*
Article 65 —Transmittal and review of records	Same *(Disposition of records)*
Article 66 —Courts of Criminal Appeals	Same *(Review by Court of Criminal Appeals)*
Article 67 —Review by the Court of Appeals for the Armed Forces	Same
Article 67a —Review by the Supreme Court	Same
Article 68 —Branch offices	Same
Article 69 —Review by Judge Advocate General	Same *(Review in the Office of the Judge Advocate General)*
Article 70 —Appellate counsel	Same
Article 71—*Reserved*	
Article 72 —Vacation of suspension	Same
Article 73 —Petition for a new trial	Same
Article 74 —Remission and suspension	Same
Article 75 —Restoration	Same
Article 76 —Finality of proceedings, findings, and sentences	Same
Article 76a —Leave required to be taken pending review of convictions	Same
Article 76b —Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment	Same
Article 77 —Principals	Same
Article 78 —Accessory after the fact	Same
Article 79 —Conviction of offense charges, lesser included offenses, and attempts	Same *(Conviction of lesser included offense)*
Article 80 —Attempts	Same
Article 81 —Conspiracy	Same
Article 82 —Soliciting commission of offenses	Same *(Solicitation)*
Article 83 —Malingering	*Article 115*
Article 84 —Breach of medical quarantine	*Article 134*
Article 85 —Desertion	Same
Article 86 —Absence without leave	Same
Article 87 —Missing movement; jumping from a vessel	*Same / Article 134*
Article 87a —Resistance, flight, breach of arrest, and escape	*Article 95*
Article 87b —Offenses against correctional custody and restriction	*Article 134*
Article 88 —Contempt toward officials	Same
Article 89 —Disrespect toward superior commissioned officer; assault of a	*Same/Article 90(1)*

Designation in Proposed UCMJ	Designation in Current UCMJ
superior commissioned officer	
Article 90 —Willfully disobeying superior commissioned officer	Same
Article 91 —Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	Same
Article 92 —Failure to obey order or regulation	Same
Article 93 —Cruelty and maltreatment	Same
Article 93a —Prohibited activities with military recruit or trainee by person in position of special trust	*New article*
Article 94 —Mutiny or sedition	Same
Article 95 —Offenses by sentinel or lookout	*Article 113 (Misbehavior of sentinel)*
Article 95a —Disrespect toward sentinel or lookout	*Article 134*
Article 96 —Release of prisoner without authority; drinking with prisoner	*Same/Article 134*
Article 97 —Unlawful detention	Same
Article 98 —Misconduct as prisoner	*Article 105*
Article 99 —Misbehavior before the enemy	Same
Article 100 —Subordinate compelling surrender	Same
Article 101 —Improper use of countersign	Same
Article 102 —Forcing a safeguard	Same
Article 103 —Spies	*Article 106*
Article 103a —Espionage	*Article 106a*
Article 103b —Aiding the enemy	*Article 104*
Article 104 —Public records offenses	*Article 134*
Article 104a—Fraudulent enlistment, appointment, or separation	*Article 83*
Article 104b—Unlawful enlistment, appointment, or separation	*Article 84*
Article 105 —Forgery	*Article 123*
Article 105a —False or unauthorized pass offenses	*Article 134*
Article 106 —Impersonation of officer, noncommissioned or petty officer, or agent or official	*Article 134*
Article 106a —Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	*Article 134*
Article 107 —False official statements; false swearing	*Same / Article 134*
Article 107a —Parole violation	*Article 134*
Article 108 —Military property of the U.S.: sale, loss, damage, etc.	Same
Article 108a —Captured or abandoned property	*Article 103*
Article 109 —Property other than military property of the United States - Waste, spoilage, or destruction	Same
Article 109a —Mail matter: wrongful taking, opening, etc.	*Article 134*
Article 110 —Improper hazarding of vessel or aircraft	Same *(Improper hazarding of vessel)*
Article 111 —Leaving scene of vehicle accident	*Article 134*
Article 112 —Drunkenness and other incapacitation offenses	*Same / Article 134*
Article 112a —Wrongful use, possession, etc., of controlled substances	Same
Article 113 —Drunken or reckless operation of a vehicle, aircraft or vessel	*Article 111*
Article 114 —Endangerment offenses	*Same / Article 134*

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 115 —Communicating threats	*Article 134*
Article 116 —Riot or breach of peace	Same
Article 117 —Provoking speeches or gestures	Same
Article 118 —Murder	Same
Article 119 —Manslaughter	Same
Article 119a —Death or injury of an unborn child	Same
Article 119b —Child endangerment	*Article 134*
Article 120 —Rape and sexual assault generally	Same
Article 120a —Mails: deposit of obscene matter	*Article 134*
Article 120b —Rape and sexual assault of a child	Same
Article 120c —Other sexual misconduct	Same
Article 121 —Larceny and wrongful appropriation	Same
Article 121a —Fraudulent use of credit cards, debit cards, and other access devices	*New article*
Article 121b —False pretenses to obtain services	*Article 134*
Article 122 —Robbery	Same
Article 122a —Receiving stolen property	*Article 134*
Article 123 —Offenses concerning Government computers	*New article*
Article 123a —Making, drawing, or uttering check, draft, or order without sufficient funds	Same
Article 124 —Frauds against the United States	*Article 132*
Article 124a —Bribery	*Article 134*
Article 124b —Graft	*Article 134*
Article 125 —Kidnapping	*Article 134*
Article 126 —Arson; burning with intent to defraud	*Same / Article 134*
Article 127 —Extortion	Same
Article 128 —Assault	*Same / Article 134*
Article 128a —Maiming	*Article 124*
Article 129 —Burglary; unlawful entry	Same
Article 130 —Stalking	*Article 120a*
Article 131 —Perjury	Same
Article 131a —Subornation of perjury	*Article 134*
Article 131b —Obstruction of justice	*Article 134*
Article 131c —Misprision of serious offense	*Article 134*
Article 131d —Wrongful refusal to testify	*Article 134*
Article 131e —Prevention of authorized seizure of property	*Article 134*
Article 131f —Noncompliance with procedural rules	*Article 98*
Article 131g —Wrongful interference with an adverse administrative proceeding	*Article 134*
Article 132 —Retaliation	*New article*
Article 133 —Conduct unbecoming an officer and a gentleman	Same
Article 134 —General article	Same
Article 134—Abusing public animal *(subject to Part II review)*	Same
Article 134—Adultery *(subject to Part II review)*	Same
Article 134—Bigamy *(subject to Part II review)*	Same

Designation in Proposed UCMJ	Designation in Current UCMJ
Article 134—Check, worthless making and uttering *(subject to Part II review)*	Same
Article 134—Child pornography *(subject to Part II review)*	Same
Article 134—Cohabitation, wrongful *(subject to Part II review)*	Same
Article 134 —Debt, dishonorably failing to pay *(subject to Part II review)*	Same
Article 134 —Disloyal statements *(subject to Part II review)*	Same
Article 134—Disorderly conduct, drunkenness *(subject to Part II review)*	Same
Article 134 —Firearm, discharging through negligence *(subject to Part II review)*	Same
Article 134—Fraternization *(subject to Part II review)*	Same
Article 134 —Gambling with subordinate *(subject to Part II review)*	Same
Article 134 —Homicide, negligent *(subject to Part II review)*	Same
Article 134 —Indecent language *(subject to Part II review)*	Same
Article 134—Prostitution and Pandering *(subject to Part II review)*	Same
Article 134 —Self-injury without intent to avoid service *(subject to Part II review)*	Same
Article 134 —Straggling *(subject to Part II review)*	Same
Article 135 —Courts of inquiry	Same
Article 136 —Authority to administer oaths	Same *(Authority to administer oaths and act as notary)*
Article 137 —Articles to be explained	Same
Article 138 —Complaints of wrongs	Same
Article 139 —Redress of injuries to property	Same
Article 140 —Delegation by the President	Same
Article 140a —Case management; data collection and accessibility	*New article*
Article 141 —Status	Same
Article 142 —Judges	Same
Article 143 —Organization and employees	Same
Article 144 —Procedure	Same
Article 145 —Annuities for judges and survivors	Same
Article 146 —Military Justice Review Panel	*Replacing old Article 146—Code committee*
Article 146a —Annual reports	*New article*

APPENDIX F:
Memorandum from Mr. Preston of September 29, 2014, Directing the Military Justice Review Group to consider the Response Systems Panel recommendations

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

SEP 29 2014

MEMORANDUM FOR DIRECTOR, MILITARY JUSTICE REVIEW GROUP

SUBJECT: Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel

On August 21, 2014, the Secretary of Defense directed that the Department review the recommendations made by the Response Systems to Adult Sexual Assault Crimes Panel to assess whether the recommendations should be approved, approved in part, or disapproved. Our office has reviewed the recommendations and has identified 14 recommendations that could benefit from an assessment by the Military Justice Review Group.

As you continue to review the military justice system, I request that you consider the 14 recommendations as part of your review. The 14 recommendations are attached.

I am grateful for the Military Justice Review Group's expertise and the important work it is performing in analyzing and proposing improvements to the military justice system.

Stephen W. Preston

Attachment:
As stated

RSP Recommendation 37: Congress not further limit the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy.

RSP Recommendation 39: Congress repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, which requires a convening authority's decision *not* to refer certain sexual assault cases be reviewed by a higher general court-martial convening authority or the Service Secretary, depending on the circumstances, due to the real or perceived undue pressure it creates on staff judge advocates to recommend referral, and on convening authorities to refer, in situations where referral does not serve the interests of victims or justice.

RSP Recommendation 40: If Congress does not repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, and the requirement for elevated review of non-referred case files continues, the Secretary of Defense direct a standard format be developed for declining prosecution in a case, modeled after the contents of civilian jurisdiction declination statements or letters. The DoD should coordinate with the Department of Justice, or with state jurisdictions that are more familiar with the sensitive nature of sexual assault cases, to develop a standard format for use by all Services. Any such form should require a sufficient explanation without providing too much detail so as to ensure the written reason for declination to prosecute does not jeopardize the possibility of a future prosecution or contain victim-blaming language.

RSP Recommendation 41: Congress not enact Section 2 of the Victim's Protection Act of 2014, which would require the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the staff judge advocate's recommendation against referral or the convening authority's decision not to refer one of these sexual assault cases. The staff judge advocate is the general court-martial convening authority's legal advisor on military justice matters; there is no evidence that inserting the senior trial counsel into the process will enhance the fair administration of military justice.

RSP Recommendation 42: Congress not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.

RSP Recommendation 43: Congress amend Section 1702(b) of the National Defense Authorization Act for Fiscal Year 2014 to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures.

RSP Recommendation 44: The Secretary of Defense direct the Services to extend the opportunity for special victim counsel representation, although not necessarily the same special victim counsel, to a victim so long as a right of the victim exists and is at issue.

RSP Recommendation 113: The Judicial Proceedings Panel and Joint Service Committee consider whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120.

RSP Recommendation 114: Congress not enact Section 3(b) of the Victim's Protection Act of 2014, which requires the convening authority to give "great weight" to a victim's preference where the sexual assault case be tried, in civilian or military court. The Services do not have control over the civilian justice system, and jurisdiction must be based on legal authority, not the victim's personal preferences, so this decision should remain within the discretion of the civilian prosecutor's office and the convening authority.

RSP Recommendation 115: The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers.

RSP Recommendation 121: Congress should enact Section 3(g) of the Victim's Protection Act of 2014 because it may increase victim confidence. Further changes to the military rules of evidence regarding character evidence are not necessary at this time.

RSP Recommendation 123: The Secretary of Defense recommend amendments to the Manual for Courts-Martial and UCMJ to impose sentences which require the sentencing authority to enumerate the specific sentence awarded for each offense and to impose sentences for multiple offenses consecutively or concurrently to the President and Congress, respectively.

RSP Recommendation 124: The Panel does not recommend the military adopt sentencing guidelines in sexual assault or other cases at this time.

RSP Recommendation 125: Congress not enact further mandatory minimum sentences in sexual assault cases at this time.

OFFICE OF THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1000

AUG 21 2014

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARY OF DEFENSE FOR COMPTROLLER/CHIEF FINANCIAL OFFICER
UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel

Over the past year, the Response Systems to Adult Sexual Assault Crimes Panel (RSP) conducted a comprehensive review of the response systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. The RSP issued its report on June 27, 2014; the report contained 132 recommendations on how to improve the effectiveness of such systems. The Secretary of Defense appreciates your efforts in supporting the work of the RSP by responding to numerous requests for information and making your personnel available to address questions. Now that the RSP has concluded its work, the Department must consider its recommendations. The work of the RSP affords a unique opportunity to consider the input from numerous subject matter experts in a broad range of disciplines, as well as victims, to inform our efforts to eradicate sexual assault from our ranks.

Please provide your views on whether to approve, approve in part, or disapprove each of the attached recommendations to the DoD General Counsel by September 5, 2014. The General Counsel should also refer the RSP's recommendations for assessment to the Military Justice Review Group and the Joint Service Committee on Military Justice, as appropriate. A tentative assignment of responsibility for implementing each recommendation (if approved) is included in the list of recommendations. Your coordination or comments on these tentative assignments should also be provided to the General Counsel by September 5, 2014. As the sponsor to the RSP, the General Counsel will consolidate the views provided and submit them with a proposed implementation plan to the Secretary of Defense for his consideration by October 8, 2014. The DoD General Counsel point of contact is Ms. Maria Fried at maria.a.fried.civ@mail.mil.

Michael L. Bruhn
Executive Secretary

Attachment:
As stated

OSD008991-14