EXECUTIVE SUMMARY
MILITARY JUSTICE REVIEW

I. INTRODUCTION. Almost fifty-four years ago, Congress enacted the Uniform Code of Military Justice. It was the most far-reaching change in military law in our history. Controversial in both Congress and the military services, it transformed the practice of military law. Although many of its innovations seem obvious and natural to us today, it represented a sea change in military justice and began the process of "judicializing" the practice of military law. The Code added important protections for military personnel, while retaining the unique and necessary role of the commander in a system designed to enhance good order and discipline in the armed forces.

The UCMJ was created against a backdrop of intense command involvement in military justice. Most officers had served as trial or defense counsel at courts-martial and as court members. The more senior officers had likely served as president of a court-martial panel, ruling on both factual and legal issues arising throughout trials. While their responsibilities as court members were severely curtailed by the creation of law officers, their experiences necessarily affected their roles in the military justice system. Investigating Officers, court members, commanders, and convening authorities all brought their personal experiences to bear in the decisions they made about military justice actions.

That line officer experience base no longer exists. The Military Justice Act of 1968 effectively removed most line officers from performing legal roles in the court-martial process, created an independent judiciary, permitted trial by military judge alone, and effectively stopped the practice of line officers serving as counsel before courts-martial. Senator Sam Ervin made clear that his intent in this Act was to eliminate legal decision-making by laymen. The Military Justice Act of 1983 moved the military justice system even closer to the federal civilian system through procedural changes and adoption of rules of evidence patterned on the federal rules.

The increased complexity of military equipment, missions, and operations in the two decades since 1983, coupled with the pace of transformation throughout the armed forces today, necessarily means that commanders and line officers have less time to devote to military justice matters. Coupling these time constraints with the dramatic decrease in their exposure to military justice matters since the Code was first enacted, we have a system predicated on a military landscape that no longer exists.

In January 2004, The Judge Advocate General directed BG Dan Wright, AJAG for Military Law and Operations, to take a fresh look at the Uniform Code, the Manual for Courts-Martial, and military justice regulations and practices and to determine how the military justice system might be transformed to better serve the needs of soldiers and commanders in a transformed Army. This report is the result.

II. BACKGROUND AND METHODOLOGY. On 5 January 2004, the committee members first met with BG Wright to begin work. After BG Wright shared his vision for the scope of the task before them, the committee received briefings on the Army transformation process. They then began the work of determining what changes in the system were needed or desired.

Over the period 5 January to 24 March 2004, committee members worked alone, in small groups, and as a committee of the whole to examine proposals for change. They read scholarly articles, studied court decisions, and reviewed proposals previously submitted to the Joint Services Committee. Following the mandate of Art. 36(a), UCMJ, that the military justice system should follow the procedures for the trial of cases in other federal courts, the committee looked closely at the Federal Rules of Criminal Procedure. The recommendations of the Cox Commission and those of commentators critical of our system received careful consideration. While the fairness of our system is paramount, the perception of fairness in the eyes of the public, Congress, and the military itself, was also a critical consideration. While the committee's work was not public, members sought input from military justice practitioners across the Army. Members of the Trial Judiciary and TJAGLCS' criminal law faculty provided valuable ideas and criticism, drafting many of the proposals the committee considered.

The committee met as a working group, using video-teleconferencing, on four occasions to consider proposals for change. Some proposals were "fast-tracked," allowing for a quick decision on their merits (or lack thereof). Others were deferred for further study. In most cases, when a proposal for change was adopted, the complete text of the Codal, MCM, or regulatory revision was available for review. With regard to the more sweeping changes, the idea was discussed in concept, draft changes to statutes or rules prepared, and the drafts reviewed before approving or rejecting the change proposal. Because of the time constraints under which the committee worked, complete change proposals were not prepared for each concept. Should TJAG approve the committee's recommendations, some additional drafting of MCM or regulatory changes will be necessary.

The committee briefed its recommendations to BG Wright on three occasions. He approved each of the proposals at TAB B, at least in concept. He also approved the "do not adopt" recommendations for the change proposals at TAB C. Many of these "do not adopt" proposals were rejected at the concept stage, and thus no statutory or regulatory draft change accompanies them. The summary of the concepts reviewed and the action taken is at TAB A. Background materials are voluminous, and are not attached to this report.

III. SUMMARY OF RECOMMENDATIONS.

A. General. The military justice system is more than a criminal code; it is a system of discipline as well. The system works well in adjudicating and punishing criminal misconduct and in enforcing discipline throughout the Army. Any changes must enhance our ability to accomplish both goals, rather than be change for change's sake.

1. *Essential Aspects of the Commander or Convening Authority's Role*. The commander must retain a high level of control over what charges a service member faces, how those charges are to be disposed of, and how and when clemency must be granted. The commander's decisions on restraint and punishment are somewhat more limited by statute and regulation, with command discretion high in the non-judicial punishment area, but more circumscribed when the case enters the court-martial arena. While the convening authority retains some discretion when the court-martial is initiated, particularly regarding witness travel and employment of experts, the military judge controls most aspects of the court-martial process. Post-trial, the convening authority should retain maximum flexibility over clemency, but should not be required to make legal decisions.

2. *The Role of the Military Judge*. When the UCMJ was enacted, an independent judiciary did not exist. Judges were overlays on the UCMJ's preexisting landscape. While the role of the military judge is not likely ever to extend as far as that of his civilian counterparts, a supervisory role earlier in the military justice process and one extended after authentication of the record is not incompatible with, and will likely enhance, the fairness and efficiency of our system. Legal decisions regarding an accused's constitutional and statutory rights should be made by judges.

3. *External Assessment of JAGC Performance*. The JAGC frequently conducts internal assessments of the services it renders to the Army in the provision of legal services. We also ask our "customers" to assess the client services aspects of our operations. Commanders continue to spend scarce monetary resources to hire additional civilian attorneys and convert other military branch spaces to attorney and paralegal positions within the uniformed forces. Nevertheless, we have not asked commanders to assess the value of the services we provide in our core function of military justice. It is time we do so.

B. Specific Recommendations.

1. Pretrial.

a. Authorize military judges greater oversight over pretrial confinement and pretrial punishment, to order sanity boards, and to issue no-contact orders.

b. Conduct further study of a requirement to record most felony interrogations.

c. Expand subpoena powers pretrial.

d. Eliminate the pretrial advice requirement for special courts-martial (an AR 27-10, not statutory, requirement).

2. Summary Courts-Martial should be simplified by removing the requirement to follow the rules of evidence. The right of compulsory process for

personal appearance of witnesses should be limited to those reasonably available (within 100 miles).

3. Trial practice

a. Adopt a form of "random selection" of court members.

b. Permit arraignment by video teleconference.

c. Expand the contempt powers of military judges.

d. Modify the guilty plea inquiry to more closely reflect federal criminal practice.

e. Increase oversight of conditional pleas of guilty

4. Punitive articles.

a. Revise the enumerated articles to include closely-related offenses now found in the MCM provisions regarding Article 134 offenses.

b. Adopt the revision of sex offenses (rape, sodomy, indecent assault) based on the federal sexual assault statute, and the unique military sexual offense revisions he proposed for Art. 134.

c. Add to the MCM military versions of the federal offenses of identity theft and child pornography.

d. Expand animal abuse to include non-public animals.

e. Add a child neglect offense to the MCM.

f. Further study of revisions to obstruction of justice offenses.

g. Make reporting for drill or AT with controlled substances in one's system at levels in excess of the DoD cut-offs an Art. 92 offense.

5. Sentencing and Records of Trial

a. Make all sentences, other than death and punitive discharges, effective immediately upon announcement.

b. Increase maximum punishments for some crimes of violence and those involving use of weapons.

c. Modify requirements for records of trial by making the verbatim/summarized decision contingent upon approved, not adjudged, sentence.

d. Require verbatim records only when review by a CCA is required.

e. Reduce the requirement for any record beyond that necessary to establish jurisdiction and the offenses charged when a discharge in lieu of courts-martial is approved after arraignment.

f. Explicitly authorize electronic records of trial.

6. Completely revise post-trial processing.

a. All sentences, as modified by pretrial agreement, if any, except death and punitive discharge become self-executing 60 days after trial, unless the CA grants clemency.

b. Submission of clemency matters not tied to preparation of record of trial, and matters must be submitted to the convening authority within 30 days after sentence is announced.

c. Report of results of trial is the only document SJA must submit to the convening authority. SJAR not required, but convening authority may request advice on clemency requests.

d. No convening authority consideration of claims of legal error, although he may disapprove findings in whole or part as a matter of clemency.

e. Military judge has the sole authority to order post-trial proceedings until record of trial is received by appellate authority, if any, or completion of 1102 review.

7. Appellate process.

a. Further study of the proposal to give the Clerk of Court authority to issue final orders on behalf of the SecArmy at the completion of appellate review.

b. Further study of requiring an accused to affirmatively request an appeal at the time his case is received by the Clerk of Court.

8. Other.

a. Require field grade officers to complete the commander's report of disciplinary action taken until eJustice fielding.

b. Continued study by TJAGLCS of delivery of military justice services to the transformed Army, including regional justice centers, deployment trial teams, and court reporter assets in active and reserve forces.

c. Continued study of services to victims and witnesses and how they will be delivered in the transformed Army.

9. Assessments.

a. An assessment of the military justice system's utility and performance during Operations Iraqi Freedom and Enduring Freedom is on-going. TJAG should be briefed on the results of this assessment.

b. Committee members drafted survey questions for convening authorities throughout the Army to solicit their views on how well the current system performs and changes they would like to see implemented. OTJAG CLD is coordinating with the Army Research Institute to revise the questions proposed and perform the survey. TJAG should carefully consider the results in decisions regarding the provision of military justice services to the transformed and transforming Army, as well as in assessing the utility of the above recommendations.

IV. CONCLUSION.

In spite of its age, the military justice system created by the UCMJ half a century ago remains basically sound. In many areas, the military justice system affords more rights to service members accused of crimes than do its federal and state counterparts. When rights of service members are circumscribed by the UCMJ, the MCM, or military regulations, there must be a military necessity for practices that differ from the federal criminal system.

The least defensible aspect of our system, at least in the view of the public, is the degree of command control possible in picking court members. While "court-stacking" to foster a particular result is thankfully rare and handled appropriately by judges when demonstrated, it is time for a system of picking court members that reduces the appearance of impropriety. A system that screens personnel assigned or attached to a particular convening authority according to established criteria, and then selects members for a particular case or period randomly from that pool is feasible and can be executed without any more mission impact than the current system.

Modifications to the UCMJ to reduce the administrative burden on commanders and convening authorities are needed. These modifications must reflect the need for command decision-making in charging and clemency, and in matters that affect budgeting and resources, but should leave legal decision-making to judges, staff judge advocates, and counsel.

Reducing the legal "niceties" for SCM will provide commanders with a more efficient disciplinary tool. Although it carries the title "court-martial," it is actually more of a disciplinary measure than a forum for adjudicating and punishing criminal misconduct.

The role of the military judge in the pretrial and post-trial process can and should be expanded. Outside observers are more likely to trust decisions rendered by judges than those by commanders. Judges can exercise an important function in preserving the constitutional and statutory rights of soldiers under severe restraint or those being punished illegally pretrial, without adverse impact on command prerogatives. Military judges now have the authority to correct these problems once charges are referred; changing the timing of such orders permits relief when relief is needed.

The military contempt statute was written at a time when law officers, not judges, presided over trials. The military appellate courts have rightfully held that violations of court orders regarding motions, witness requests, and the like cannot be enforced so as to deny an accused his substantial rights under the UCMJ and the MCM. Revision of the contempt statute will permit judges to enforce orders within their authority against the person violating the order.

Congress prohibited unlawful command influence in Article 37. The Court of Appeals for the Armed Forces has declared unlawful command influence to be the "mortal enemy" of justice in the military. Congress considered the failure to comply with provisions of the UCMJ establishing rights of the accused to be sufficiently important to make it a punitive article, but it is one never used. Greater military judge authority is more likely to achieve the Congressional intent implicit in Articles 37 and 98 than any other measure we can take in revising the UCMJ.

Article 45 was enacted to ensure that service members were not coerced into guilty pleas, but it was enacted when non-lawyers served as defense counsel, and law officers and courts-martial presidents shared many of the duties now committed firmly to independent military judges. The federal guilty plea process is adequate to ensure that pleas are not coerced in the military, particularly when the process is supervised by judges and the accused has the benefit of free and independent defense counsel.

Permitting judges to authorize post-trial judicial proceedings does not impinge on command prerogatives. It ensures counsel and convicted soldiers have a single place to raise issues that affect the integrity of the post-trial process.

Determining if clemency is warranted rather than if any legal error occurred is the proper focus of the convening authority once a court-martial is concluded. Making sentences effective immediately and executed automatically more effective focuses the post-trial system on the exceptional cases that warrant clemency, rather than compliance with procedure at the expense of substance. This change will have the ancillary, but nonetheless salutary, benefit of reducing appellate litigation on pleas of guilty.

Within the framework of the UCMJ, the review committee has proposed changes which will increase both actual fairness and the perception of fairness of our criminal justice process. Commanders and service members both will benefit.

VI. THE ROAD AHEAD.

Implementing substantial changes in the UCMJ and MCM is likely to be a long process. Some recommendations, such as the modernization of sexual assault statutes, may be handled on an individual basis due to Congressional interest. Other recommendations will necessarily need to be packaged as part of an omnibus proposal. Securing DoD's and other services' concurrences, while not essential, is more likely to result in positive action. The Court of Appeals for the Armed Forces Code Committee is a possible ally, and as legislation is necessary for most of the proposed changes, Congressional sponsorship will be essential.