3-2. Proposal to Increase Statutory Role of the Military Judge [includes merged proposals 3-5, 3-9, 3-10, 6-1, and 15-3]

Concise Summary of Proposed Change: Although the court-martial itself does not come into existence prior to referral, every case has a life of its own that begins at the time of the alleged offense, and significant legal issues arise prior to referral. This proposal recognizes that a military judge could play an important supervisory role in the military justice process prior to referral of charges. While commanders and convening authorities will continue to make all critical decisions in the case: preferral, level of referral, funding witnesses and experts, and clemency, this proposal will relieve the Special Court-Martial Convening Authorities (SPCMCA) and General Court-Martial Convening Authorities (GCMCA) from the burden of making essentially judicial decisions on other matters. In addition, the proposal permits the accused to obtain pre-referral relief from illegal pretrial punishment in violation of Article 13 or from illegal pretrial confinement. The military judge may issue appropriate orders to persons subject to the UCMJ to require compliance with the Code when charges have been preferred or pretrial restraint imposed, and can enforce this power through the expanded contempt provisions of Article 48. The existing procedures for contempt are antiquated and the fines for contempt are inadequate as punishment. The proposed contempt revision melds Fed. R. Crim. Pro. 42 with current military practice and expands the fine that may be adjudged from $100 to $5,000, but keeps the confinement capped at 30 days. Additionally, the revision repeals Article 98, an entirely unused punitive article, but makes similar conduct punishable as contempt.

Rationale:

- Brings court-martial practice more in line with the rules of practice and procedure in the federal system.

- Responds to criticism that the military justice system has no meaningful oversight mechanism for overzealous commanders and SJAs. This lack of judicial involvement has been a source of criticism by the public. “Under the current system, neither defense counsel nor prosecutors have a judicial authority to whom to turn until very close to the date of trial. This creates delay, inefficiency, and injustice, or at a minimum, the perception of injustice….” (Cox Commission Report at page 9)

- Provides for neutral judicial supervision of critical pre-trial procedural aspects of the case. This is more in line with federal civilian practice, following the mandate of Article 36(a).

- Streamlines the judicial process by permitting the military judge to take control of the process upon preferral of charges or imposition of restraint.

- Effectively eliminates the need for collateral investigations, including IG investigations, into the administration of military justice.

- Permits an accused the opportunity to obtain real and meaningful pre-trial relief for Article 13 violations and illegal pretrial confinement.

- Provides military judges with needed tools to maintain order and enforce judicial rulings, particularly with regard to civilian witnesses, counsel, family members, and others who may occasionally obstruct the process.

- The ABA Standards for Criminal Justice, Special Functions of the Trial Judge, 6-4.1, note the inherent authority of the trial judge to cite and punish summarily, if necessary, willful obstructions of the criminal trial process. The proposed changes bring courts-martial in line with these standards relating to contempt.

- Removes the convening authority from the contempt process, substituting appeal on request to service appellate courts.

- Imposes more realistic penalties and swifter process on offenders

- Creates a bench trial for contempt, rather than requiring members to remain after conclusion of the court-martial to hear any "show cause" contempt prosecution.

- Remands civilians sentenced to confinement to U.S. Marshal's Service, rather than–conceivably–to a military confinement facility.

Con:

- Could be perceived as taking authority and control of the military justice system away from the command.

- Significantly increases the duties and responsibilities of military judges and may require an increase in the size of the military trial judiciary.

- Will require significant MCM amendments in addition to those already drafted.

- Will require a cultural change in approaching cases.

- May be perceived as giving military judges too much power.

- Authority of a military judge to sentence civilians is more likely to be exercised under revised rules than under current ones.

- Reductions in the role of the convening authority may be resisted by Army leadership (although it may be welcomed by the public/press).

- Reduces the current, albeit never-exercised, reach of Article 98, by limiting punishment of unlawful command influence to those parties to the court-martial.

Dereliction of duty could conceivably cover exercise of unlawful command influence committed by commanders and convening authorities who could not be punished for contempt.

Impact on other proposals for change or the military justice system: Exercise of contempt powers under the notice and hearing provision might unduly task a particular SJA office with extra work.

Other studies, articles, or information considered:

1. Cox Commission Report and DoD response.

2. Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57.

3. Theodore Essex and Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission."* 52 A.F. L. REV. 233 (2002).

4. Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, 2002 ARMY LAW. 20 (April 2002).

UCMJ Articles and MCM Provisions Affected by This Proposal:

The left column lists the areas in which the statute will expand the authority of the military judge. The right column lists the corresponding articles and RCMs that would need to be examined and/or amended in light of the new authority.

Expanded Authority	Affected Articles & RCMs
1. Illegal Pretrial Punishment	UCMJ Art. 13 RCM 304
2. Pretrial Confinement	UCMJ Art.10 RCM 305
3. No-Contact Orders	Article 13a or 14a (to be drafted) RCM 304a or 305a (to be drafted)
4. Inquiries into Mental Capacity	RCM 706
5. Contempt Power	UCMJ Art. 48, Art. 98, and Art. 66 RCM 801 RCM 809
6. Detailing Military Judge	R.C.M. 503
7. Responsibilities of Military Judge.	R.C.M. 801

Draft Statutory Changes:

UCMJ Article 26a. Supervisory Authority of the Military Judge.

(a) Upon preferral of charges, imposition of pretrial restraint, or illegal pretrial punishment, the military judge shall assume overall supervisory responsibility for preserving the statutory and constitutional rights of the accused.

(b) For good cause shown, the military judge may order persons subject to the Uniform Code of Military Justice to comply with provisions of this Code, the Constitution of the United States, and other applicable legal authority related to preserving the statutory and constitutional rights of the accused. Personnel who violate these orders shall be subject to contempt proceedings under Article 48 of this code.

(c) Upon preferral of charges or imposition of pretrial restraint, the military judge shall exercise overall judicial supervisory authority for all procedural aspects of the case. Under such procedural regulations as may be prescribed by the Secretary concerned, this shall include, but not be limited to, the authority to review confinement decisions of military magistrates, to issue search authorizations, direct the scientific testing of evidence, order inquiry into the mental capacity or mental responsibility of the accused, and to issue no-contact orders and other protective orders as appropriate.

PROPOSAL 1 (recommended by the committee)

Repeal Art. 98 and amend Art. 48 to read:

(1) A military judge of a court-martial or the presiding officer of a military commission, military tribunal, or provost court shall have power to punish by fine or imprisonment, or both, contempt of his or her authority.

(2) Contempt, for purposes of this chapter, is limited to:

(a) Misbehavior of any person in the presence of the court-martial, including sessions under Article 39 of this chapter;

(b) Disruption or disturbance of the court-martial proceedings by any person engaged in an affray or disorder in the vicinity of the court-martial, including sessions under Article 39 of this chapter.;

(c) Misbehavior of any court-martial personnel in their official duties pertaining to a particular court-martial, including, but not limited to, unnecessary delay in the disposition of a case of a person accused under this chapter, and any knowing and intentional failure to comply with the procedural rules of this chapter; and

(d) Willful disobedience or refusal to comply by any person subject to this chapter; or by any person acting as counsel for a person subject to this chapter, of any ruling, writ, process, order, rule, decree, or command issued by a military judge or the presiding officer of a military commission, military tribunal, or provost court.

(3) Notwithstanding the provisions of §48(2) above, nothing in this chapter empowers a military judge to hold any convening authority in contempt for his or her actions pertaining to matters committed to that convening authority's discretion by any other provision of this chapter or the Manual for Courts-Martial.

(4) Punishment for contempt may not exceed confinement for 30 days or a fine of $5000, or both.

Draft MCM Change

Amend Rule for Courts-Martial 809 to read:

(a) *In general*. Military judges may exercise contempt power under Article 48. The term "military judge" in this rule includes military judges detailed as presiding officers of military commissions, other military tribunals, provost courts, and summary courts-martial. Contempt, as defined by Article 48, differs in its reach, depending on the nature of the conduct in question.

Discussion

Article 48 has been extensively revised. Portions of the former punitive Article 98 are now encompassed within Article 48. A summary court-martial, unless a military judge is detailed, may not punish for contempt. The procedures for punishing contempt differ, depending on whether the contempt is directly observed by the military judge or reported to the military judge by others.

Each contempt may be separately punished.

A person subject to the code who commits contempt may be tried by court-martial or otherwise disciplined for such misconduct in addition to the punishment for contempt.

A military judge may order a person removed from the vicinity of the court-martial, whether or not contempt proceedings are held.

In some cases it may be appropriate to warn a person whose conduct is improper that persistence therein may result in removal or punishment for contempt. See R.C. M. 804, 806.

(1) *Contempt by misbehavior, disruption or disorder.* The words "any person," as used in Article 48(2)(a) and (b), include all persons, whether or not subject to military law, except foreign nationals (other than an accused being tried by a military tribunal or provost court) outside the territorial limits of the United States who are not otherwise subject to the code. Thus, witnesses, family members, or members of the public in general who commit contempt may be punished under Article 48. "Misbehavior" includes riot, disorder, menacing words or gestures, disruption of court proceedings by loud or profane words, displays of approval or approbation from the gallery, or other disruptive conduct. To be punishable under these sections of Article 48, such conduct must occur during court sessions, including closed sessions for deliberations by the military judge or court members, either in the courtroom or the immediate vicinity of the courtroom.

Discussion

Article 48(2)(a) and (b), as revised, reaches misbehavior committed in the presence of the court-martial (including sessions under Article 39), and affrays and disorders in the vicinity of the court-martial which disturb or disrupt the proceedings. "Presence" includes those places outside the courtroom itself, such as waiting areas, deliberation room, and other places set aside for the use of the court-martial while it is in session. When the behavior occurs outside the courtroom, actual disruption or disturbance of the proceedings is necessary before the behavior may be punished as contempt.

(2) *Misbehavior in official capacity as contempt.* This form of contempt covers non-compliance with procedural rules such as were formerly proscribed by Article 98. The failure to comply with procedural rules as set forth in the code, or misbehavior by court personnel in connection with their official duties, would be punishable under this provision. "Court-martial personnel" includes civilian personnel who have official duties in connection with the court-martial system, such as court reporters. "Misbehavior" may include, but is not limited to, such conduct as: intentionally delaying the processing of a

case without good cause; unlawful command influence exercised by one court member upon another; tampering with evidence; knowingly and intentionally questioning a suspect or accused in violation of Article 31; or violations of Article 13's restrictions on unlawful pretrial punishment by escorts, guards, or other court personnel.

Discussion

Article 48, by its terms, does not reach commanders, investigating officers, or confinement personnel who are not otherwise acting as court-martial personnel. A commander who has unlawfully subjected a service member to pretrial punishment could not be punished for contempt. However, a commander who knowingly and willfully violates a military judge's order concerning conditions of restraint could be punished for contempt. A trial counsel who approves the pretrial confinement of a service member without charges being preferred and with full knowledge that the command is using confinement as a subterfuge to hold the service member while an administrative discharge is being processed might be held in contempt, however, for a violation of Article 10.

(3) *Willful disobedience of judicial orders*. Punishment of this form of contempt is limited to military personnel, civilian counsel for an accused, or an accused's "advocate" or "prisoner comrade" as defined in the Geneva Conventions. Witnesses not subject to the code could not be held in contempt for a refusal to testify, but could be prosecuted in Federal District Court under Article 47. This contempt need not occur in the presence or vicinity of a court-martial. Thus, a willful failure or refusal by counsel to file a motion in accordance with a pretrial order might be punishable as contempt, regardless of whether the failure occurred during a court session or otherwise. A refusal by a military witness to testify as ordered by a military judge may be punishable as contempt, notwithstanding that such conduct might also be punishable as a violation of Article 90, 91, or 92.

Discussion

In the event of a court-martial conviction for conduct previously punished as contempt, the sentencing authority must be advised of the prior punishment, but no sentence reduction is required as a result of prior punishment for contempt.

(4) *Conduct not punishable as contempt*. By its terms, Article 48 does not reach violations of judicial orders when other provisions of the code or this Manual commit the subject of those orders to the discretion of a convening authority. A military judge may not, therefore, punish as contempt the convening authority's refusal to grant immunity, to produce at government expense a particular witness, or to defer forfeitures or confinement, as these are matters committed to the convening authority's discretion by other provisions of the code or Manual. Abatement of the proceedings remains the appropriate remedy for the refusal to produce a witness or grant immunity.

Discussion

Revision of Article 48 was not intended to impede a convening authority's exercise of his or her lawful authority. A convening authority who knowingly exercises unlawful command influence upon court members or other court personnel could be punished for contempt.

Nothing in Article 48 grants the military judge any additional authority to issue orders, writs, decrees, etc., not found in other provisions of the code or this Manual, other than orders holding individuals in contempt of court or orders to show cause why the individual should not be held in contempt.

(b) *Method of disposition*.

(1) *Summary disposition*. When conduct constituting contempt is directly witnessed by the military judge, the conduct may be punished summarily.

(2) *Disposition upon notice and hearing.* When the conduct apparently constituting contempt is not directly witnessed by the military judge, the alleged offender shall be brought before the military judge in a session under Article 39(a), and informed orally or in writing of the alleged contempt, and directed to show cause why he or she should not be held in contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proven beyond a reasonable doubt before it may be punished.

(c) *Procedure*. The military judge shall determine in all cases whether to punish for contempt, and, if so, what the punishment shall be. The military judge shall also determine when during the court-martial the contempt proceedings shall be conducted. If the court-martial is composed of members, any contempt proceeding shall be conducted outside the members' presence. Contempt must be proven beyond a reasonable doubt before punishment may be imposed.

(1) *Summary disposition.* The military judge shall issue essential findings orally on the record or in writing when summarily finding a person in contempt. The record must reflect that the military judge directly witnessed the conduct giving rise to the contempt proceedings. Otherwise, the provisions of (b)(2), above, and (c)(2), below, apply.

(2) *Contempt hearing, docketing and counsel*. The military judge shall docket the contempt hearing promptly. The military judge, after consultation with the installation or command staff judge advocate, may designate a trial counsel to prosecute the alleged contempt. If the contempt proceedings, other than those subject to summary disposition, involve disrespect toward or criticism of the military judge, that judge is disqualified from presiding over the contempt hearing.

(d) *Record; review.* A verbatim record of the contempt proceedings will be made, and a copy will be appended as an appellate exhibit to the record of the court-martial in which it occurred. If a person is held in contempt, he or she may request review of the finding of contempt in the court of criminal appeals of the military service having appellate jurisdiction over the court-martial in which the contempt occurred.

Discussion

The court of criminal appeals authorized to hear appeals from persons held in contempt is the court with potential or inchoate jurisdiction over the court-martial in which the contempt arose, notwithstanding the fact that any sentence adjudged in the court-martial in question might not authorize appeal to a court of criminal appeals.

(e) *Sentence.* A sentence imposed pursuant to a finding of contempt shall begin to run immediately. The place of confinement for a military person who is held in contempt and sentenced to confinement need not be designated by the military judge, but will ordinarily be that confinement facility in which service members convicted by court-martial and sentenced to similar periods of confinement are confined. Civilians sentenced to confinement will be remanded to the custody of the United States Marshal's Service for transport to the appropriate place of confinement. Sentences to confinement or fines will be executed immediately, with fines payable to the United States Treasury. The military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings. The military judge may, in his or her sole discretion, delay execution of a contempt sentence to permit the person held in contempt to seek review by an appellate court.

Discussion

The immediate commander of the person held in contempt, or in the case of a civilian, the U.S. Marshal's Service, should be notified immediately so that the necessary action on the sentence may be taken.

(f) *Informing person held in contempt*. The person held in contempt shall be informed by the military judge in writing of the holding and sentence, if any.

Discussion

Copies of this document should be furnished to such other persons, including the immediate commander of the offender, as may be concerned wit the execution of the punishment. A copy shall be included with the record of both the court-martial and the contempt proceeding.

PROPOSAL 2 (COL Condron) (does not repeal and incorporate Art 98)
6-1 Revise Contempt Rules - Art. 48 and RCM 809 (CONDRON ALTERNATIVE)

Concise Summary of Proposed Change: Amend Article 48. Article 48 was enacted at a time when independent military judiciaries did not exist. The existing procedures for contempt are antiquated and the fines for contempt are inadequate as punishment. The proposed revision is minor and is aimed at correcting a problem cited by military judges. The proposal expands the fine that may be adjudged from $100 to $5,000, but keeps the confinement capped at 30 days. All contempt proceedings would be tried before military judges, not court members. The amended Article 48 provides additional authority for military judges to enforce their court orders and rules and provides a remedy for willful and knowing violations without subjecting the offender to a career-ending court-martial conviction.

Amend Art. 48 to read:

(1) A military judge of a court-martial or the presiding officer of a military commission, military tribunal, or provost court shall have power to punish by fine or imprisonment, or both, contempt of his or her authority.

(2) Contempt, for purposes of this chapter, is limited to:

(a) Misbehavior of any person in the presence of the court-martial, including sessions under Article 39 of this chapter;

(b) Disruption or disturbance of the court-martial proceedings by any person engaged in an affray or disorder in the vicinity of the court-martial, including sessions under Article 39 of this chapter;

(c) Willful disobedience or refusal to comply by any counsel representing the United States or by any person acting as counsel for a person subject to this chapter, of any ruling, writ, process, order, rule, decree, or command issued by a military judge or the presiding officer of a military commission, military tribunal, or provost court.

(3) Punishment for contempt may not exceed confinement for 30 days or a fine of $5000, or both.

3-3 Speedy Trial and Detention Rules

Concise Summary of Proposed Change: Revamp speedy trial and detention rules to align more closely to federal rules.

Rationale:

Pro:

- Current speedy trial protections for service members, which include R.C.M. 707, Articles 10 and 33, UCMJ, the Constitution, and case law, do not prohibit the lengthy confinement of service members without charges or a prompt pretrial investigation. A recent high-profile example of this practice occurred in the CPT Yee case.

- As a result, service members can currently be held without charges or a pretrial investigation for time periods greatly exceeding that in the federal system. For example, if detained by a federal magistrate, a defendant is entitled to a preliminary hearing within ten days of his initial appearance before the magistrate (the initial appearance must occur "without undue delay," and normally takes place within hours of a defendant's arrest). This ten-day period can be extended at the defendant's request, and can also, of course, be waived by the defendant.

- The attached proposals (to amend Articles 10, 32, and 33, UCMJ) bring military pretrial detention proceedings more into line with federal detention practices – including the Bail Reform Act of 1984 (which controls detention proceedings), the Speedy Trial Act of 1974, and the Federal Rules of Criminal Procedure. The attached proposals also take into account operational realities, and provide for certain exceptions in those cases.

Con:

- Failure of the government to comply with the time limits proposed results in release of the accused from pretrial confinement, and could result in dismissal of charges under certain circumstances.

- Currently, it is typical for a service member to be placed into pretrial confinement at the early stages of a criminal investigation. Investigative practice may have to adapt to comply with the charging and pretrial investigative time limits by comporting more with federal investigations, which are typically much further along prior to arresting a suspect.

Impact on other proposals for change:

The proposals to involve the military judge prior to referral may impact on the mechanisms of this proposal. The attached proposals do not assume military judge involvement prior to referral.

Other studies, articles, or information considered:

Unpublished Thesis, LTC Patricia Ham, *"Put in the Clink:" a Proposal to End Confinement of Servicemembers Without Charges and a Prompt Pretrial Investigation*, and all sources cited therein (available upon request).

A. Proposed Statutory Amendments
(from unpublished thesis as cited above)

The proposed amendment to Article 10, UCMJ, adds one new sentence, as follows: "The trial of those persons ordered into arrest or confinement in accordance with this article shall be accorded priority." This sentence essentially mirrors that found in the Speedy Trial Act at 18 U.S.C. § 3164(a)(2), and gives statutory weight to a principle currently set forth in the non-binding discussion of Rule for Court-Martial 707(a)(1). This amendment does not change the sanction for violation of Article 10: dismissal of the affected charges and specifications with prejudice.

The amendment to Article 32, UCMJ, adds section (f)(1) through (3), and states:

> (f)(1) The investigation shall commence within ten days after charges are preferred against an accused, unless the accused consents to or requests one or more delays. Where the accused does not consent to or request a delay, the appropriate authority may extend the time limit only upon a showing, by clear and convincing evidence, that extraordinary circumstances exist and justice requires a delay. In the absence of the accused's consent, under no circumstances will the investigation of an accused who remains ordered into arrest or confinement commence later than fifteen days following preferral of charges.
>
> (2) When the accused has been ordered into arrest or confinement, failure to commence the investigation within the time period required by subsection (f)(1) shall result in the accused's immediate release from arrest or confinement. An investigation "commences" when the taking of testimony or presentation of other evidence at the investigation begins.
>
> (3) Willful or reckless failure to release the accused from arrest or confinement when the time limits set forth herein are knowingly violated shall result in dismissal of the affected charges and specifications with prejudice. Mere negligent failure of the government to release the accused when the statute is violated shall result in the dismissal of the affected charges and specifications with or without prejudice.

This amendment is patterned after Federal Rule of Criminal Procedure 5.1 (c) through (f), but actually allows more than the ten-day period from initial appearance to preliminary hearing permitted by that Rule to allow for the exigencies of military practice. In fact, because the proposed amendment to Article 33, UCMJ, set forth below, allows a maximum of seven days, except in extraordinary cases, from the start of confinement until preferral of charges, the government actually has up to seventeen days in which to commence the investigation in the ordinary course, which can extend, in extraordinary cases, up to twenty-two days. If the government meets the extraordinary circumstances set forth in Article 33 which then permits it fifteen days before it must prefer charges, it then has twenty-five days, and even up to thirty days under extraordinary circumstances within which to commence the investigation.[1]

There is no acceptable excuse under any circumstance for the government to hold a servicemember in confinement for longer than thirty days without commencing the pretrial investigation. This is particularly true where the federal government has only ten days within which to hold its preliminary investigation. The fact that the government has up to thirty days to indict a detainee is of no moment. There is still no requirement, apart from the listless and ignored requirement of the original Article 33, for the military act most analogous to indictment, referral of charges, to occur within that time period.

The initial remedy for violation of the proposed amendment to Article 32, release from confinement, is also the same as in federal practice.[2] Because there is no military

---

[1] If the day by which the government must either prefer charges or commence the pretrial investigation falls on a weekend or federal holiday, the government must take its action by the first business day after the weekend or federal holiday.

[2] 18 U.S.C. § 3060(d).

judge with the power to enforce the release remedy until after referral, an additional remedy of dismissal with prejudice is provided if the government willfully or recklessly fails to release the accused from arrest or confinement when the timelines of the rule are not met. The dismissal for the government's willful or reckless failure to release the confinee when it knowingly violates the law is intended to sharply sanction the government in order to punish its ignoring the clear mandate of the rule. When the government's failure to release is merely negligent, dismissal should be without prejudice, as the need for a sharp sanction decreases under these circumstances; however, the government does not need to knowingly violate the rule in this latter instance in order to merit dismissal without prejudice. In extreme cases not rising to willful or reckless behavior on the part of the government, dismissal may be with prejudice.

The proposed amendment to Article 33, UCMJ, adds section (b)(1) through (b)(3). It states:

> (b)(1). When any person is ordered into arrest or confinement for trial by either special or general court-martial, charges must be preferred within seven days from the date on which such person was ordered into arrest or confinement. Failure to file charges within the required time limit shall result in the immediate release of the person from arrest or confinement.
>
> (2) Upon a showing, by clear and convincing evidence, both that extraordinary circumstances prevent preferral of charges within the time limit set by section (b)(1), and that release of the accused will result in a serious threat to the safety of any person or the community in general, the appropriate authority may extend the time limit to fifteen days. Under no circumstances will any person remain under arrest or confinement for greater than fifteen days in the absence of preferred charges.

> (3) Willful or reckless failure to release the accused from arrest and confinement when this rule is knowingly violated shall result in dismissal of the affected charges and specifications with prejudice. Mere negligent failure of the government to release the accused when the rule is violated shall result in dismissal of the affected charges and specifications with or without prejudice.

This provision is modeled after 18 U.S.C. § 3161(b), but gives less time than the thirty days from arrest to indictment allowed by the federal rule, for several reasons. First, in practice, a detained federal defendant normally receives either a preliminary hearing or is indicted within ten days of arrest, notwithstanding the thirty days allowed by the rule. Second, to allow any more than seven days would bring the amendment into conflict with the existing Article 33.[3] If the existing Article 33 remains, the proposed amendment serves to limit the "if practicable" language that resulted in the loophole that swallowed the rule in cases of general courts-martial. The proposed amendment applies to all courts-martial, not just general courts-martial, because there is no good reason to limit the rule merely to general courts-martial. In fact, the contrary is true – the government should not be permitted to hold any servicemember without charges – but in particular, those servicemembers held to face the equivalent of a misdemeanor deserve charges in their case to be preferred with dispatch. Third, the initial remedy for noncompliance in the federal system is dismissal with or without prejudice; the proposed amendment limits the initial remedy for noncompliance to release from confinement. Fourth, preferral of charges in the military is more analogous to a federal complaint then it is a federal indictment.[4] When a commander or other person prefers

[3] An alternative proposal is to simply repeal the existing Article 33 and replace it with this amendment.
[4] *See supra*, note 327, for a definition of a federal complaint.

charges, he or she must only swear that he "has personal knowledge of, or has investigated" the charged matters and that they are true "to the best of that person's knowledge or belief."[5] There is no requirement for the equivalent of probable cause to believe the accused committed the offense with which he is charged until referral, the military act most analogous to a federal indictment.[6]

The proposed amendment also contains an exception in extraordinary cases that allows confinement for a maximum of fifteen days without charges. In order to avail itself of this additional time, the government shoulders a two-pronged burden that it must meet by clear and convincing evidence: first, to show extraordinary circumstances; and second, to prove a risk to a person or to the safety of the public in general. The first prong of the burden is to ensure that the exception does not swallow the rule, and remains in use only in the extreme case. The second is based on the Bail Reform Act, and mirrors the showing necessary to prove dangerousness under that statute, arguably a "key factor in the civilian scheme,"[7] and part of the rationale for the Supreme Court's decision in *Salerno* to uphold the constitutionality of that statute. Risk of flight is not an acceptable reason to extend the time period for preferring charges. The "appropriate authority" to which the government must make its showing is, in the Army, the military magistrate, and in other services, the equivalent to the military magistrate.

---

[5] MCM, *supra*, note 10, at R.C.M. 307(b)(2).

[6] *Id*. at R.C.M. 406(b), discussion (standard for Staff Judge Advocate in his pretrial advice to recommend referral is probable cause); and R.C.M. 601(d)(1) and (2) (basis for referral includes "reasonable grounds to believe that an offense triable by court-martial has been committed and that the accused committed it;" convening authority cannot refer charge in absence of pretrial advice required by R.C.M. 406(b)).

[7] GILLIGAN AND LEDERER, *supra*, note 15, at § 4-32.00.

Finally, as with the proposed amendments to Article 32, the remedy increases from mere release from confinement to dismissal of the affected charges and specifications to sanction the government for its willful or reckless failure to release an accused when it knowingly violates the statute. This recognizes, once again, that the accused normally has limited recourse until after referral of the charges and the military judge's entry into the court-martial process. The sanction of dismissal with prejudice for willful or reckless failure to release the accused punishes the government for its conduct under those circumstances. The mere negligent failure to release the accused can result in dismissal without prejudice; as with the proposed amendment to Article 32, UCMJ, no requirement for a knowing violation exists with regard to negligent failures, and, in extreme cases where the government is still not acting willfully or recklessly, dismissal can be with prejudice.

Rules for Courts-Martial 305, 405, and 707 should also be amended by the President to reflect the statutory amendments. Those amendments need only incorporate the statutory language and rationale for the amendments as set forth above.

3-4 Video or Audio Taped Felony Interrogations

Concise Summary of Proposed Change: Require videotaped interrogations for certain offenses.

Rationale:

Pro:

- Four states currently require audio or videotaping of custodial interrogations, either by statute or case law, as a prerequisite to admissibility of any statements made by a defendant during such interrogations (Texas (statute), Alaska (case law interpreting state constitution), Minnesota (case law based on court's supervisory powers over administration of justice), and Illinois (statute effective 18 Jul 2005). A fifth state, New Hampshire, does not require recording but will not allow an interrogation only partially recorded (i.e. where the authorities record only the incriminating parts of a lengthy interrogation) to be admitted against a defendant. Other states do not require recording, but the courts encourage it. In states that do not require recording, some police departments nonetheless voluntarily do so.

- In military practice, the military police are authorized, but not required, to record interviews and interrogations. AR 190-30, Military Police Investigations, para. 3-24 (1 Jun 1978) (currently undergoing revision; revision does not alter the 1978 regulation in this area). There is no guidance regarding the practice of CID interrogations available in publicly accessible documents (those available on USAPA.army.mil, specifically AR 195-1 and 195-2), but experience reveals that such interrogations are rarely audio or videotaped, with the exception of interviews of child victims.

- States that require recording of custodial interrogations cite goals such as promoting the integrity of the judicial system by determining the admissibility of confessions on the basis of objective evidence rather than the testimony of interested parties as the rationale for the taping requirements. In addition, states with a recording requirement report that it has had positive effects. In Minnesota, for example, which has required taping of custodial interrogations since 1994, the Supreme Court reports that "fewer cases come before us in which a key issue is whether a suspect waived his or her constitutional rights during interrogation." *Minnesota v. Conger*, 652 N.W.2d 704 (Minn. 2002). "A national study of police departments that videotape custodial interrogations offers evidence of other benefits . . . In those jurisdictions, videos help police accurately assess a suspect's guilt or innocence, foster humane treatment of suspects and respect for civil rights, and serve to persuade the public that police interrogations are professional and trustworthy [citation omitted]. Ninety-seven percent of those police departments found videotaping 'on balance, to be useful.'" *Id*.

- Limiting such a requirement to "custodial interrogations" may not be sufficient in the military, since many soldiers are ordered to report to CID for questioning, regardless of whether such an order results in the subsequent interrogation being "custodial" in nature, and because Article 31, UCMJ triggers rights warnings regardless of custody. An alternate proposal is requiring recording of all CID suspect interrogations.

Con:

- Operational realities may preclude taping in certain instances, and an exclusionary rule in those instances would be too harsh a remedy.

- There is some expense associated with equipping interrogation rooms with video and audiotaping equipment, and in maintaining the tapes.

- CIDC strongly opposes any requirement to audio or video tape interrogations, citing typing, storage, retention, duplicating and retrieval costs, as well as concerns that members and judges would react negatively to interrogation techniques.

Impact on other proposals for change: Would impact on Military Rules of Evidence, including possibly Rules 301, 304, and/or 305.

Other studies, articles, or information considered:

1. *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (1997).

2. Daniel Donovan and John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223 (2000).

3. Richard A.Leo, *Panel Three, Miranda's Irrelevance: Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001).

4. Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003).

5. *New Hampshire v. Barnett*, 147 N.H. 334, 789 A. 2d 629 (N.H. 2001).

6. *Minnesota v. Scales*, 518 N.W. 2d 587 (Minn. 1994).

7. *Minnesota v. Conger*, 652 N.W. 2d 704 (Minn. 2002).

8. *Stephan v. Alaska*, 711 P.2d 1156 (Alaska 1985).

9. 725 Ill. Comp. Stat. 5/103-2.1 (2003).

10. Tex. Code Crim. Proc. Art. 38.22 (2004).

3-5 Subpoena Power Changes

Concise Summary of Proposed Change: Permit Art. 32(b) Investigating Officers and counsel representing the United States at such hearings to issue subpoenas, permitting needed evidence to be obtained prior to the referral of charges.

Rationale:

Pro:

- No mechanism currently exists to compel a civilian witness to appear at a pretrial investigation or to obtain documents for such investigations from agencies that require a subpoena before production.
- Federal prosecutors and grand juries have subpoena powers; Article 36(a) mandates military practice to conform to that in federal courts insofar as is practical.
- Testimony of otherwise unavailable witnesses would be preserved.
- Testimony and evidence thus obtained might lead to early dismissal of some or all offenses or an early decision to offer a pretrial agreement.

Con:

- Being required to testify twice might cause some witnesses to be uncooperative by the time of trial.
- Article 32 hearings could become more expensive and protracted, should investigating officers be overzealous in issuing subpoenas.
- Since TCs would have subpoena powers at Article 32 stage, but not otherwise until referral, more Article 32 hearings would be ordered.
- Will increase use of prior inconsistent statements to impeach at trial.
- Doesn't go far enough; criminal investigators need subpoena powers, too.

Impact on other proposals for change or the military justice system: Might impact on study of pretrial process. Could be unnecessary if military judges or magistrates are given greater oversight over cases pre-referral.

Other studies, articles, or information considered:
Fed.R.Crim.P. 17

3-5 Subpoena Power changes

Amend RCM 703(e)(2)(C) as follows:

(C) *Who may issue.* A subpoena may be issued by an Article 32(b) investigating officer, the counsel representing the United States at such hearing, the summary court-martial, or trial counsel of a special or general court-martial to secure witnesses or evidence for that hearing or court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings, respectively.

3-6 Peremptory Challenges [deferred until decision on random selection]

Concise Statement of Proposal: Increase the number of peremptory challenges each side is allowed to use on panel members in courts-martial.

Rationale: Under military law, each side is currently allowed one peremptory challenge in a court martial. R.C.M. 912(g). In contrast, the federal criminal rules allow each side 20 peremptory challenges in capital cases and 6 peremptory challenges for the government and 10 for the defendant in other felony cases. Peremptory challenges are also allowed in misdemeanor cases, although Fed.R.Crim.P 24 does not specify a number for either side.

Pro: Increasing the number of peremptory challenges would move the military justice system more in-line with the federal criminal system, and, therefore, make it less susceptible to outside criticism.

Con: Increasing the number of peremptory challenges for each side would require the government to increase the number of panel members at each court-martial. The result would be that the more soldiers would be pulled away from their normal duties.

The military does not have to adopt the same number of peremptory challenges as the federal system. One possibility is that for Special Courts-Martial, the government could get 1 peremptory challenge and the defense 2. For General Courts-Martial, the government could get 2 and the defense 4. Such an approach might strike a good balance between the two extremes.

Impact on other proposals for change: Trial Practice: 2) Amend Art. 25 to explicitly permit random selection or can random selection work within current Art. 25?

Other studies, articles, or information considered: Fed.R.Crim.P Rule 24;
The Continued Viability of Peremptory Challenges in Courts-Martial, Lieutenant Colonel James A. Young, III, The Army Lawyer, Jan. 1992, at 20.

5-1 Summary Court-Martial (SCM)

Concise Summary of Proposed Change: Recreate SCM as a simple disciplinary tool, without the encumbrances of the court-martial system. Revamp rules:

1) so that Rules of Evidence do not apply; and

2) so that the SCM has compulsory process for reasonably available witnesses, with alternate means of presenting testimony otherwise.

Eliminate application of the MRE to SCMs

Rationale:

Pro:

- Would make SCMs more efficient and simple to use in field or deployed environments
- Line officers assigned as SCMs find it nearly impossible to apply the MRE; SCM ignore the MREs (leading to setting the findings and sentence aside, should the accused appeal) or when applied (such as in urinalysis cases) force the command to withdraw charges or refer to a higher level of court in order to afford production of expert witnesses
- CAAF has recently indicated that the rules for SCM need not mirror those for SPCM or GCM
- SCM are capable of determining the reliability of statements, reports, investigations, etc., and of considering telephonic or recorded testimony and determining the appropriate weight to be provided.
- Coupling the inapplicability of the MREs with the compulsory process provisions would provide a check upon one-sided evidence collected by either the government or the accused.

Con:

- Might result in more SCM turn-downs, since they might appear less “fair”
- A significant change that lawyers might find difficult to accept
- Makes SCM look a lot like NJP

Amend Manual for Courts-Martial, R.C.M. 1304(b)(2)(E):

Replace (i) with: “With the exception of Military Rules of Evidence 301, 302, 303, 305, 412 and Section V, the summary court-martial is not bound by the Military Rules of Evidence and may consider any matter, including unsworn statements, that are reasonably believed to be relevant to the offense.”

Replace (ii) with: “The summary court-martial shall arrange for the attendance of those witnesses whom he or she deems necessary, relevant and not cumulative for the prosecution and defense, including those requested by the accused, if these witnesses are reasonably available. A witness is “reasonably available” when the witness is located within 100 miles of the situs of the court-martial and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and the effect on military operations of obtaining the witness’ appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)-(6) is not “reasonably available.”

6-2- Random Selection of Court Members

Concise Summary of Proposed Change: Courts-martial must not only be fair; they must appear to be fair. Current and historical perceptions by soldiers (anecdotal) and by the public have always been that the panel selection system is unfair. While the system as it currently exists is fair, it is not perceived that way. References 2 and 6, below,, do a good job of summarizing the arguments pro and con. The main arguments against change are that random selection would interfere with the commander's control of his personnel and that methods involving random selection are too cumbersome and difficult to use (particularly while at sea or while deployed). The Joint Services Committee study in 1999 (reference 1) concluded that the current system is the best alternative, focusing on its actual fairness. This study was required by the National Defense Authorization Act for 1999. The Cox Commission Report (reference 2), recognized the appearance of improper influence created by the existing system and recommended an immediate change and respectfully (and strongly) disagreed with the JSC. The committee recommends consideration of two options, one retaining the Art. 25 criteria for inclusion in a pool of potential members, and the other creating a broad pool of potential members based on years of service, with Secretarial authority to exclude members from the pool for operational or other reasons.

Rationale:

Pro:

- Would bring us more in line with civilian practice.
- Improve soldier and public perception of fairness.
- Removes the traditional control of process from commanders.

Con:

- Removes some aspects of the traditional control of process from commanders.
- Resistance from field due to perceived loss of operational control and perceived difficulty in execution.
- Small degree of complexity is added to selection process.

Impact on other proposals for change or the military justice system: May impact panel member challenge procedures

Other studies, articles, or information considered:

1. DoD Joint Services Committee on Military Justice, *Report of the DoD Joint Service Committee on the Selection of Members of the Armed Forces to Serve on Courts-Martial*, August 1999.
2. The Cox Commission, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, May 2001.
3. MAJ Guy Glazier, USMC, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members three—Selection of Military Juries by the Sovereign: Impediment to Military Justice,* 157 Mil.L.Rev 1, October 1998.
4. COL James Young, USAF, *Revising the Court Member Selection Process*, 163 Mil.L.Rev 91, March 2000.
5. *U.S. v Benedict*, 55 M.J. 451 (C.A.A.F. 2001) (discussing a panel selection experiment and application of Art 25; Effron, J., (dissenting) stating that staff selection of members does not comply with Art 25)
6. MAJ Christopher Behan, U.S. Army, *In Defense of Convening authority selection and appointment of Court Martial Panel Members*, 176 Mil.L.Rev 190 (June 2003) (Note: numerous articles collected and cited at FN 25).

Amend Art 25

825. ART, 25. WHO MAY SERVE ON COURTS-MARTIAL

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special courts-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any 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.

PROPOSAL 1: Selection of a pool based on current Art. 25 criteria; random selection within the pool

(d)(1) The convening authority shall identify as potential court members those members of the Armed Forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. Once identified, court members will be detailed under the regulations of the Secretary Concerned, unless random selection is not possible due to physical conditions or military exigencies. In such cases, the convening authority shall state, in writing, why random detailing is not possible. The statement shall be appended to the record of trial, and the convening authority shall then personally select the members, based on the criteria above.

(2) No court member is eligible to serve as a member of a general or special court-martial when he or she is the accuser or witness for the prosecution, has acted as investigating officer or as counsel in the same case. Absent exigent circumstances, no

court member junior in rank to the accused is eligible to serve as a member of that general or special court-martial. Randomly selected members may be excused pursuant to the regulations of the Secretary Concerned"

PROPOSAL 2**:** Pool of Eligible Members based on Years of Service

(d)(1) When convening a court-martial, the convening authority shall randomly detail to the court-martial members with six or more years of military service. Pursuant to regulations of the Secretary concerned, the pool of available members may be narrowed for operational reasons. If random detailing is not possible due to physical conditions or military exigencies, the convening authority must make a detailed written statement, to be appended to the record, stating why random detailing was not practicable. In such cases, the convening authority may personally select the court members based on age, education, training, experience, length of service, and judicial temperament.

(2) No member is eligible to serve as a member of a general or special court-martial when he is the accuser or witness for the prosecution or has acted as investigating officer or as counsel in the same case. Absent exigent circumstances, no court member junior in rank to the accused is eligible to serve as a member of a general or special court-martial."

6-3 Video Arraignments

Concise Summary of Proposed Change: Amend Article 39(a) and RCM 803 and/or 804 to permit an accused to be arraigned by video-teleconference. The accused and the defense counsel must be present at the same location, but the judge and trial counsel could be located elsewhere.

Rationale: A similar proposal is already under JSC consideration. It tracks arraignment procedures in both federal and state systems, which allow incarcerated defendants to be arraigned or to make initial appearances via video-teleconferencing, but following the current state trend, does not require the accused's permission.

Pro:

- Limits the number of TDYs a trial judge may have to take by allowing one judge to handle arraignments at multiple installations from one location. Especially valuable when the accused is on a ship or at an installation with no military judge available.
- Could speed the processing of courts-martial by avoiding travel delays.

Con:

- Video technology can be expensive and could require renovation of existing courtroom facilities.

Impact on other proposals for change: None noted.

Other studies, articles, or information considered:

Uniform Code of Military Justice

Article 26(a)

. . . The military judge shall preside over each open session of the court-martial to which he has been detailed.

Article 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of –

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused**;** and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel, and shall be made a part of the record. For arraignments only, and when permitted by regulations of the Secretary concerned, "presence" may be via video teleconferencing, if the accused and defense counsel are together at one location. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29)

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge.

Rules for Courts-Martial

Rule 803. Court-martial sessions without members under Article 39(a)

A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. . . . All such sessions are part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.C.M. 840 and 805, and shall be made a part of the record.

Rule 804. Presence of the accused at trial proceedings

(a) *Presence required*. The accused shall be present at the arraignment . . . except as otherwise provided by this rule.

Rule 805. Presence of military judge, members, and counsel

(a) *Military judge.* No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge, if detailed.

Rule 904. Arraignment

Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading. The Secretary concerned may publish regulations permitting video teleconferencing to arraign an accused, provided the accused and defense counsel are together at one location.

AR 27-10

Paragraph 5-23

When an Article 39(a), UCMJ, session is conducted by the military judge before assembly, the arraignment may be held and the plea of the accused may be accepted at that time by the military judge. Video teleconferencing may be used to arraign the accused prior to assembly at the discretion of the military judge so long as the accused is together with his counsel at one location for the arraignment. In addition, at an Article 39(a), UCMJ, session conducted before assembly**,** the military judge may enter at that time findings of guilty on an accepted plea of guilty.

6-4 Amend RCM 917

Concise Summary of Proposed Change: Permit a military judge, sua sponte, to overturn a finding of guilty, whether the finding is made by a panel or the presiding military judge. Corrects an anomaly in the current rule that allows the military judge to reconsider at any time until authentication the denial of a motion for a finding of not guilty, but does not permit a military judge to do so, *sua sponte,* in the absence of a motion. In reviewing a record of trial for authentication, a military judge may become aware for the first time of a deficiency of proof for one or more specifications. Unless the CA is willing to set aside the findings of guilty, correction must now wait on appellate review, a needless waste of appellate resources.

Rationale:

Pro:

- Some proof deficiencies become more apparent in hindsight
- The military judge may overturn members' findings now when the defense has made a 917 motion but may not do so when no motion has been made– clearly anomalous result.
- Would clearly permit a military judge to overturn his or her own finding of guilty without the requirement of a 917 motion.
- Errors corrected by entry of a NG finding or an LIO finding at the earliest possible time, obviating the need for sentence reassessment or a rehearing years later.
- Avoids unnecessary appellate litigation on factual or legal sufficiency.

Con:

- Eases defense counsel's burden to request 917 motions
- Would require an additional post-trial hearing to permit parties to litigate issue; under current rule, the hearing occurs before findings are announced.
- Assuming a complete failure of proof on an element of an offense, no rationale SJA would fail to take corrective action by recommending that the CA set aside the finding affected.
- Will only affect a very small percentage of cases.

Impact on other proposals for change or the military justice system: Little to no impact on other proposals

Other studies, articles, or information considered: None

6-4 MJ Entry of JNOV

Amend RCM 917(f) as follows:

(f) *Timing and Effect of ruling.* A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time prior to authentication of the record of trial. The military judge may, *sua sponte*, at any time prior to authentication of the record of trial, enter a finding of not guilty of one or more offenses charged, or may enter a finding of not guilty of a part of a specification as long as a lesser offense charged is alleged in the portion of the specification. Prior to entering such a finding or findings, the military judge shall give each party an opportunity to be heard on the matter in a post trial Article 39(a) session.

8-1 Eliminate *Care* Inquiry

Concise Summary of Proposed Change: Article 45, UCMJ, is redrafted, based on Fed. R. Crim. P. 11, with changes to accommodate military practice, such as refusing to permit nolo pleas. The proposal also prohibits pleas of guilty to any capital offense. In its current form, Article 45 is a vestige of the extremely paternalistic system designed to protect an accused from a coerced plea. The military justice system has changed significantly since Art. 45 was enacted; both independent judiciaries and independent defense counsel serve as guards against a coerced plea. The change eliminates the lengthy inquiry currently required by the *Care* decision. The accused must understand the nature of the offense to which he is pleading, but does not require the military judge to recite the elements and to inquire of the accused the factual basis for the plea. A stipulation of fact, or recitation of facts by counsel, to which the accused assents, will satisfy the factual basis for the plea. The proposal does not alter the *Green-King* inquiry requirement dealing with the military judge's obligation to ensure that the accused understands the pretrial agreement. If inconsistencies are noted, the judge must resolve them, rather than the appellate court via a remand.

Rationale:

Pro:

- The explicit adoption of Rule 11 will encourage CAAF to follow Supreme Court precedent. *See U.S. v. Redlinski*, 58 M.J. 117 (2003) (Crawford, C.J., dissenting) (advocating adoption of Rule 11 Supreme Court jurisprudence to interpretation of R.C.M. 910).

- The military judge is must still ensure that the plea is voluntary; statements inconsistent with the plea, such as those raising potential defenses, would still need to be resolved in order to ensure voluntariness.

- Will eliminate much appellate litigation concerning failure to comply strictly with the requirements of *Care*.

Con:

- Leaves to the MCM the specific standard by which to measure voluntariness of pleas

- The proposed change is a radical departure from the requirements of the current *Care* inquiry, which are an integral part of the history and tradition of military justice and military pleas.

- The proposal does not address the issue of plain error in a guilty plea, recently discussed by the Supreme Court in *United States v. Vonn*, 535 U.S. 55 (2002), but would, by implication, adopt the Court's view on that issue.

Other Necessary Changes:

a. R.C.M. 910 and/or the analysis thereof.

b. Significant Revision of MJ Benchbook.

Current Article 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the pleas or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect or if he fails or refuses to plead, a plea of not guilty shall be entered into the record, and the court shall proceed as though he had pleaded not guilty.
(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Proposed Revised Article 45.

(a) After arraignment, an accused may plead guilty, guilty of a lesser offense, guilty by exceptions, guilty by exceptions and substitutions, or not guilty. If the accused refuses to plead, the military judge shall enter a plea of not guilty.
(b) An accused may enter a conditional plea of guilty, provided the military judge and the government consent, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the affected plea of guilty.
(c) Before accepting a plea of guilty, the military judge must address the accused personally in open court. The military judge must advise the accused of, and determine that the accused understands, the following:
(1) The right to plead not guilty;
(2) The nature of the offense to which the plea is offered;
(3) The maximum penalty that may be imposed upon the accused as the result of his plea of guilty;
(4) That any false statements the accused makes about the offense to which a plea of guilty is offered may be later used against him in a prosecution for perjury or false statement;
(5) That the plea of guilty waives: the right to a trial of the facts as to that offense; the right against self-incrimination; and the right to confront the witnesses against him and to compulsory process of witnesses for the accused.
(d) The military judge must ensure that the plea is voluntary and not the result of force or threats or promises, apart from any plea agreement, and that there are no sub rosa agreements regarding the accused's plea.
(e) The military judge shall not accept any plea of guilty unless the factual basis for such plea is established on the record by a stipulation of fact, inquiry of the accused, or otherwise.

(f) If the accused, upon advice of counsel, enters into an agreement to plead guilty, the written agreement, if any, shall be disclosed in open court, and the military judge is required to obtain the parties' agreement as to the meaning and effect of any ambiguous terms. If the agreement is unwritten or if the accused is not represented by qualified counsel, the parties shall disclose the agreement's terms, and the military judge shall determine that the accused understands those terms.
(g) Prior to the military judge's acceptance of a plea, the accused may withdraw a plea of guilty for any reason or no reason. After acceptance of the plea but prior to announcement of sentence, the military judge may permit withdrawal of a plea of guilty for good cause.
(h) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.
(i) Any variance from these procedures which does not materially affect the substantial rights of the accused may be disregarded.

8-2 Conditional Guilty Plea Change

Concise Summary of Proposed Change: Amend AR 27-10 to require Chief, GAD approval of conditional guilty pleas. Recommend adoption.

Rationale:

Pro:

- Eliminates the potential for a reversal of an adjudged court-martial conviction requiring a new trial potentially years after the initial trial.
- R.C.M. 910a(2) provides for Secretarial action to withhold approval authority for conditional guilty pleas.

Con:

- Could potentially delay the processing of some cases.
- Removes discretion from the GCMCA.

Impact on other proposals for change or the military justice system: None.

Other studies, articles, or information considered: None.

Text of Proposed Change to AR 27-10:

5–25. Entry of findings of guilty pursuant to a plea

b. Because conditional guilty pleas subject the government to substantial risks of appellate reversal and the expense of retrial, the authority to enter into conditional pleas of guilt under R.C.M. 910 may be exercised only after obtaining the approval of the Chief, Government Appellate Division. The Chief, Government Appellate Division will, after coordination with the Assistant Judge Advocate General for Military Law and Operations, decide whether to grant such approval.

9-1 Revise Sex Offenses.

Concise Statement of Proposal: Revise sex offenses.

Rationale:

TJAG has approved proposal from COL Barto to revise sex offenses.

Impact on other proposals for change:

Other studies, articles, or information considered:

New statutory provisions

10 U.S.C. § 920 shall be repealed and replaced with the following provision:

§ 920 Sexual Abuse

(a) Any person subject to this chapter who knowingly causes another person to engage in a sexual act -

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

is guilty of **aggravated sexual abuse by force or threat** and shall be punished as a court martial may direct.

(b) Any person subject to this chapter who knowingly -

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby -

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

is guilty of aggravated sexual abuse and shall be punished as a court-martial may direct.

(c) Any person subject to this chapter who knowingly engages in a sexual act with another person who has not attained the age of 12 years is guilty of **aggravated sexual abuse of a minor** and shall be punished as a court-martial may direct. The Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(d) Any person subject to this chapter who knowingly -

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or

(2) engages in a sexual act with another person if that other person is -

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

is guilty of **sexual abuse** and shall be punished as a court-martial may direct.[8]

(e) Any person subject to this chapter who knowingly engages in a sexual act with another person who -

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging; and

(3) is not that person's spouse,

is guilty of **sexual abuse of a minor** and shall be punished as a court-martial may direct.[9] The Government need not prove that the defendant knew the age of the other person engaging in the sexual act or that the requisite age difference existed between the persons so engaging. It is a defense, which the accused must establish by a preponderance of the evidence, that the accused reasonably believed that the other person had attained the age of 16 years.

---

[8] To be limited in Part IV, MCM, and Table of Maximum Punishments to 20 years confinement, DD, TF.

[9] To be limited in Part IV, MCM, and Table of Maximum Punishments to 15 [20] years confinement, DD, TF.

(f) Any person subject to this chapter who knowingly engages in a sexual act with another person who is -

(1) in official detention or confinement; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging; and

(3) is not that person's spouse,

is guilty of **sexual abuse of a detainee/confinee** and shall be punished as a court-martial may direct.[10]

(g) Definitions.

(1) The term ''sexual act'' means –

(A) the penetration, however slight, of the anal or genital opening of another by a penis;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(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; or

(D) 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.

(2) The term "grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

[10] To be limited in Part IV and Table of Maximum Punishments to one year confinement, BCD, TF.

10 U.S.C. § 118 (4) (Felony Murder) shall be amended to delete, “sodomy, rape,” inserting instead, “any form of aggravated sexual abuse.”

10 U.S.C. § 925 (Sodomy) shall be repealed.

10 U.S.C. § 928 (Assault) **shall be amended to include the following provisions:**

(c) Any person subject to this chapter who knowingly engages in or causes sexual contact with or by another person without that other person’s consent is guilty of **indecent assault** and shall be punished as a court-martial may direct.[4]

> **(d) T**he term ''sexual contact'' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

[4] To be limited in Part IV, MCM, and Table of Maximum Punishments to 10 years confinement, DD, TF.

104a. Article 134 – (Sexual Misconduct)

a. *Text*. *See* Paragraph 60.

b. *Elements*.

1. That the accused wrongfully engaged in or caused a sexual act or sexual

contact with or by another person;

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

c. *Explanation.*

1. *Definitions.* "Sexual act" is defined in Article 120(h), UCMJ. "Sexual contact'' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Conduct is "wrongful" if it is without justification or excuse.

2. *Prejudice and Discredit.* Sexual misconduct must be either directly prejudicial to good order and discipline or service discrediting to be punishable under this provision. Sexual misconduct that is directly prejudicial includes acts that have an obvious and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of, or respect toward, a servicemember. Discredit means to injure the reputation of the armed forces and includes sexual conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. Sexual misconduct may be service discrediting even though the conduct is only indirectly or remotely prejudicial to good order and discipline. While sexual conduct that is private and discreet in nature may not be service discrediting by this standard, it may nevertheless be prejudicial to good order and discipline under the circumstances. This offense may be based upon

conduct that is adulterous or indecent if such conduct is also prejudicial or discrediting.

3. *Discretion.* Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether sexual misconduct is prejudicial or discrediting:

(i) The accused's age, marital status, military rank, grade, or position;

(ii) The co-actor's age, marital status, military rank, grade, and position, or relationship to the armed forces;

(iii) The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;

(iv) The effect, if any, of the misconduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;

(v) The misuse, if any, of government time and resources to facilitate the commission of the conduct;

(vi) Whether the conduct persisted despite counseling or orders to desist;

(vii) The flagrancy or public nature of the conduct, such as whether any notoriety ensued;

(viii) Whether the act was accompanied by other violations of the UCMJ;

(ix) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;

(x) Whether the accused or co-actor was legally separated; and

(xi) Whether the sexual acts involve an ongoing or recent relationship or are remote in time.

d. *Lesser-included offense.* Article 80 – attempts.

e. *Maximum punishment.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for one year.

Part IV, MCM, provisions to be deleted after enactment of the statute:

1. Para. 51 – Sodomy
2. Para. 62 – Adultery
3. Para. 63 – Indecent Assault
4. Para. 90 – Indecent Acts with Another

Part IV, MCM, provisions involving sexual misconduct that will be retained:

1. Para. 65 – Bigamy
2. Para. 69 – Cohabitation, Wrongful
3. Para. 87 – Indecent Acts Or Liberties W/Child
4. Para. 88 – Indecent Exposure
5. Para. 89 – Indecent Language

Part IV, MCM, provisions involving sexual misconduct that will require revision if statutory revision is enacted:

1. Para. 43 – Murder
2. Para. 45 – Rape and Carnal Knowledge
3. Para. 54 – Assault

Other MCM provisions that will require revision if statutory revision is enacted:

1. Text of Uniform Code of Military Justice (Appendix 2)
2. Table of Maximum Punishments (Appendix 12)
3. Analysis of Punitive Articles (Appendix 23)

9-7 Add Identity Theft Offense

Concise Summary of Proposed Change: Include an identity theft offense under Article 134 based on 18 USC 1028. A violation of 18 USC 1028 may be charged as a Clause 3 offense of Article 134 as a crime and offense of unlimited application. There appear to be no similar offenses of a purely military nature that could not be charged as a violation of 18 USC 1028. According to CID, there have been relatively few investigations of offenses under 18 USC 1028. Additionally, the JSC is drafting training modules for all DOD attorneys to provide basic instruction regarding criminal offenses related to information technology.

Rationale:

Pro

- Creates specific elements for the identity theft offense in the UCMJ.
- Creates model specifications for such offense.
- Eliminates jurisdictional issues (interstate commerce) present in the US Code.

Con:

- Offense is already contained in 18 USC 1028.
- There is no specific military offense that is not covered by 10 USC 1028.
- Such offenses are not investigated by CID and are referred to the Secret Service.

Impact on other proposals for change or the military justice system: None

Other studies, articles, or information considered:

Training modules to instruct attorneys on identity theft are being prepared.

9-7 Add new Article 134 - Identity Theft

Article 134 (Identity Theft)

a. *Text*. *See* paragraph 60.

b. *Elements*.

(1) *Use of False Identification to obtain products or services*.

(a) That the accused knowingly and without lawful authority used, produced, possessed, or transferred certain personally identifying information;

(b) That the use, production, possession, or transfer of such personally identifying information was for the purpose of obtaining money, products or services or the unauthorized use of products or services; and

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

(2) *Use of False Identification to damage credit rating*.

(a) That the accused knowingly and without lawful authority used, produced, possessed, or transferred certain personally identifying information;

(b) That the use, production, possession, or transfer of such personally identifying information resulted in the damage, alteration or destruction of a person's or business's credit rating, credit worthiness or other similar financial rating; and

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

c. *Explanation*. For purposes of this paragraph, the following definitions apply:

(1) "Personally identifying information" means name, social security number, bank account number, credit card number, password, personal identification number (PIN), date of birth, or similarly personal identification information. "Personally identifying information" also means identification documents, including documents issued, certified or approved by the United States Government, the governments of any state, county, city or local entity, foreign governments or subdivisions thereof, businesses, associations, or other similar organizations, where such documents are a type intended or commonly

accepted for the purpose of identification of individuals or businesses. “Personally identifying information” also means information intended to identify individual persons, groups of persons, associations, organizations, corporations, partnerships, limited liability corporations or other business entities. "Personally identifying information" does not include a person's own information, unless such information was used to generate a fictitious account for the purposes of evading payment or responsibility.

(2) "Products or services" means any good, service or merchandise that may be purchased or received without purchase whether or not such item or service is received in exchange for money or services.

(3) "Person’s or business’s credit rating, credit worthiness or other similar financial rating" means any such rating or evaluation made by a person, corporation or organization on behalf of itself or any third party.

d. *Lesser included offenses*. Article 80—attempts.

e. *Maximum punishment.* Values of products or services taken at different times from the same victim may be aggregated to determine the maximum punishment. Values of products and services taken from separate victims will ordinarily not be aggregated to determine maximum punishments.

(1) *Use of False Identification to obtain products or services of a value of $500 or more*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *Use of False Identification to obtain products or services of less than $500.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Use of False Identification to damage credit rating*. Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specifications*.

(1) *Use of False Identification to obtain products or services.* In that (personal jurisdiction data), did, at _____, on or about ____knowingly and without lawful authority use, produce, possess, or transfer certain personally identifying information, to wit: (credit card number) (bank account number) (name) (date of birth) (address) (_____), and that such use, production, possession or transfer was for the purpose of obtaining (money) (products) (services) (the unauthorized use of products or services).

(2) *Use of False Identification to damage credit rating.* In that (personal jurisdiction data), did, at _____, on or about ____knowingly and without

lawful authority use, produce, possess, or transfer certain personally identifying information, to wit: (credit card number) (bank account number) (name) (date of birth) (address) (_____), and that such use, production, possession or transfer resulted in the (damage) (alteration) (destruction) of a (person's) (business's) (credit rating) (credit worthiness) (other similar financial rating).

9-8 and 9-9 Child Pornography Offenses

Concise Summary of Proposed Change: Include an offense under Article 134 based on 18 USC 2252 and 2252A to create a child pornography offense in the MCM. While a violation of 18 USC 2252 or 2252A may be charged as a Clause 3 offense under Article 134 as a crime and offense not capital, including a specific MCM offense provides judge advocates and commanders a single source for charging these offenses.

Rationale:

Pro:

- Creates specific elements for a child pornography offense in the MCM, which may be altered as needed, based on legal issues that may develop.

- Creates model specifications for such offense readily available regardless of the availaibility of the US Code

- Eliminates the requirement to plead and prove interstate commerce

Con:

- Offense is already contained in 18 USC 2252 and 2252A; there is no specific military offense that is not covered by 10 USC 2252 or 2252A.

- Adoption of such an offense under Article 134 would create a lengthy offense virtually identical to the federal offense.

- Requires proof of conduct prejudicial to good order or service discrediting conduct

Impact on other proposals for change or the military justice system: It would require the addition of specific affirmative defenses in the MCM and the MJ Benchbook.

Other studies, articles, or information considered: None.

9-8 and 9-9 Add new Article 134 Offense - Child Pornography

Article 134 (Child Pornography)

a. *Text*. *See* paragraph 60.

d. *Elements*.

(1) *Mailing or otherwise transporting child pornography*.

(a) That the accused knowingly mailed, or transported or shipped by any means, including viewing and downloading such images by computer, any child pornography; and

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

(2) *Receiving or distributing child pornography*.

(a) That the accused knowingly received or distributed any child pornography or any material that contains child pornography that has been mailed, or shipped or transported by any means, including by computer; and,

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

(3) *Reproducing, distributing, soliciting child pornography.*

(a) That the accused knowingly

(1) reproduced any child pornography for distribution through the mails, or by any other means, including by computer; or

(ii) advertised, promoted, presented, distributed, or solicited through the mails, or by any other means, including by computer, any material or purported material in a manner that reflected the belief, or that was intended to cause another to believe, that the material or purported material was, or contained a visual depiction of an actual minor engaging in sexually explicit conduct; and

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

(4) *Sale or possession with intent to sell child pornography*.

(a) That the accused knowingly sold, or possessed with the intent to sell, any child pornography; and

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

(5) *Possession of child pornography*.

(a) That the accused knowingly possessed any book, magazine, periodical, film, videotape, computer disk, or any other material that contained an image of child pornography; and

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

(6) *Distribution of child pornography to minors*.

(a) That the accused knowingly distributed, offered, sent, or provided to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is of a actual minor engaging in sexually explicit conduct; and

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

(7) *Mailing or otherwise transporting materials with visual depictions of minors engaging in sexually explicit conduct*.

(a) That the accused knowingly transported or shipped by any means including by computer or mails, any visual depiction, if

(i) the producing of such visual depiction involved the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction was of such conduct; and

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

(8) *Receiving or distributing materials with visual depictions of minors engaging in sexually explicit conduct*.

(a) That the accused knowingly received or distributed any visual depiction that has been mailed, shipped or transported by any means including by computer, or knowingly reproduced any visual depiction for distribution by any means including by computer or through the mails, if--

(i) the producing of such visual depiction involved the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction was of such conduct; and

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

(9) *Selling or possession with the intent to sell materials with visual depictions of minors engaging in sexually explicit conduct*.

(a) That the accused knowingly sold or possessed with intent to sell any visual depiction, if--

(i) the producing of such visual depiction involved the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction was of such conduct; and

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

(10) *Possession of materials with visual depictions of minors engaging in sexually explicit conduct*.

(a) That the accused knowingly possessed 1 or more books, magazines, periodicals, films, video tapes, containing a visual depiction if--

(i) the producing of such visual depiction involved the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction was of such conduct; and

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

c. *Explanation.*

(1) In general. It is not an element of any offense under this paragraph that the minor depicted actually exist.

(2) For purposes of this paragraph, the following definitions apply:

(a) “Child Pornography” means any visual depiction, including any photograph, film, video, picture, or computer image or picture, whether

made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

(b) "Minor" means any person under the age of 18 years;

(c) "Sexually explicit conduct" means actual or simulated:

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person.

(d) "Producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

(e) "Visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, or computer image or picture, whether made or produced by electronic, mechanical, or other means.

(3) Affirmative defenses. It shall be an affirmative defense to a charge of possession of depictions of minors engaging in sexually explicit conduct and possession of depictions of minors engaging in graphic sexual conduct that the accused:

(a) possessed less than 3 such visual depictions; and

(b) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any such visual depiction:

(i) took reasonable steps to destroy each such visual depiction; or

(ii) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

(4) *Admissibility of evidence*. On motion of the government, in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from

the absence of such evidence.

d. *Lesser included offenses*. Article 80—attempts.

f. *Maximum punishment.*

(1) Subparagraph b(5) *Possession of child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) All other offenses (subparagraphs b(1) through (4) and (6) through (10). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specifications*.

(1) *Possessing, mailing or otherwise transporting child pornography*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly (produce)(distribute)(receive)(possess with intent to distribute)(download and view) child pornography, to wit a (photograph) (video) (film)(picture)(digital image)(computer image)(drawing) (cartoon) (sculpture) (painting) of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse) (bestiality) (masturbation) (sadistic abuse)(masochistic abuse)(the lascivious exhibition of the genitals or pubic area).

(2) *Receiving or distributing child pornography*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly (receive) or (distribute) child pornography, to wit a (photograph) (video) (film) (picture) (digital image) (computer image) (drawing) (cartoon) (sculpture) (painting) that was (mailed) (shipped) (transported by means of _____).

(3) *Reproducing, distributing, soliciting child pornography*.

In that _____ (personal jurisdiction data), did, at _____, on or about____ knowingly (reproduce for distribution through the (mail) (_____)) or (advertise)(promote)(present)(distribute)(solicit through the (mails) (_____)) child pornography, to wit a (photograph) (video) (film) (picture) (digital image) (computer image) (drawing) (cartoon) (sculpture) (painting) of an actual minor engaging in sexually explicit conduct, to wit: (sexual intercourse) (bestiality) (masturbation) (sadistic abuse) (masochistic abuse) (the lascivious exhibition of the genitals or pubic area).

4) *Sale or possession with intent to sell child pornography*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____knowingly (sell) (possess with the intent to sell) child pornography, to wit a (photograph) (video) (film) (picture) (digital image) (computer image) (drawing) (cartoon) (sculpture) (painting) that is of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse)(bestiality)(masturbation)(sadistic abuse)(masochistic abuse)(the lascivious exhibition of the genitals or pubic area).

(5) *Possession of child pornography*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly possess a (_____) containing child pornography, to wit a (photograph) (video) (film) (picture) (digital image) (computer image) (drawing) (cartoon) (sculpture) (painting) of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse)(bestiality)(masturbation)(sadistic abuse)(masochistic abuse)(the lascivious exhibition of the genitals or pubic area).

(6) *Distribution of child pornography to minors*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly (sent) (distribute) (offer) (provide) to a minor child pornography, to wit a (photograph) (video) (film) (picture) (digital image) (computer image) (drawing) (cartoon) (sculpture) (painting) of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse)(bestiality)(masturbation)(sadistic abuse)(masochistic abuse)(the lascivious exhibition of the genitals or pubic area).

(7) *Mailing or otherwise transporting materials with visual depictions of minors engaging in sexually explicit conduct*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly (transport)(ship by means of _____) a visual depiction produced with the use of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse)(bestiality)(masturbation)(sadistic abuse)(masochistic abuse)(the lascivious exhibition of the genitals or pubic area) and such visual depiction was of such conduct.

(8) *Receiving or distributing materials with visual depictions of minors engaging in sexually explicit conduct*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly (receive) (distribute) any visual depiction that has been (mailed) (transported) (shipped by means of _____) and that such visual depiction was produced with the use of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse)(bestiality)(masturbation)(sadistic abuse)(masochistic abuse)(the lascivious exhibition of the genitals or pubic area) and such visual depiction was of such conduct.

(9) *Selling or possession with the intent to sell materials with visual depictions of minors engaging in sexually explicit conduct*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly (sell) (possess with intent to sell) a visual depiction produced with the use of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse) (bestiality) (masturbation) (sadistic abuse) (masochistic abuse) (the lascivious exhibition of the genitals or pubic area) and such visual depiction was of such conduct.

(10) *Possession of materials with visual depictions of minors engaging in sexually explicit conduct*.

In that _____ (personal jurisdiction data), did, at _____, on or about _____ knowingly possess (_____) a visual depiction produced with the use of a minor engaging in sexually explicit conduct, to wit: (sexual intercourse) (bestiality)

(masturbation) (sadistic abuse) (masochistic abuse) (the lascivious exhibition of the genitals or pubic area) and such visual depiction was of such conduct.

9-10 Add Abuse of an Animal Offense

Concise Summary of Proposed Change: Amend paragraph 61, Part IV, MCM to include abuse of privately owned or abandoned animals as an offense. Slightly increases the penalty for abuse of public animals, making it a more serious offense than abuse of privately owned or abandoned ones. Explains when conduct that might otherwise be considered abusive is not wrongful.

Rationale: An abuse of an animal (other than a public animal (see Article 134)) is currently charged as a violation of a local regulation or under the assimilated crimes act if an appropriate statute applies. Overseas, there are no state statutes to assimilate. The current maximum punishment for abuse of a public animal does not permit a punitive discharge, which may be appropriate in egregious cases of torture or abuse.

Pro:

- Animal abuse has been linked to an increased potential to commit crimes of violence against persons.
- Proof of 'public' nature of unit mascots may be difficult, but the inability to prosecute may lead to "self help" against the perpetrators.
- Based on the value of drug detector dogs or EOD dogs, punishments for abuse of public animals are inadequate.
- Would standardize prosecutions for animal abuse. Abuse of other than public animals must be charged under various state codes. Abuse of pets in overseas locations cannot be charged at all by military authorities, unless the conduct can be shown to be a general disorder under Article 134.
- Provides explicitly for certain defenses (defense of persons, property, ending the suffering of a seriously ill or damaged animal, and reasonable disciplinary measures)

Con:

- Most states have offenses that could be assimilated
- A relatively minor offense–not worth the effort to get the change adopted.
- Defenses could cause controversy with animal rights groups.

Impact on other proposals for change or the military justice system: none noted

Other studies, articles, or information considered: Arose in context of recent courts-martial where proof of “public” character of the animal was in question.

Article 134– (Abusing public animal)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused wrongfully abused a certain animal;

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

[Note: if the animal is alleged to be a public animal, add the following element]

(3) That the animal was a public animal.

c. *Explanation.*

A public animal is any animal owned or used by the United States; an animal owned or used by a local or State government in the United States, its territories or possessions; or any wild animal located on any public lands in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the government. Privately owned or abandoned animals would include privately owned pets, stray or abandoned animals, as well as animals raised by private individuals for resale to others. This paragraph does not apply to any animal defined or declared to be a pest by the administrator of the United States Environmental Protection Agency. The accused's conduct is not wrongful if the accused reasonably believed that the conduct was necessary to prevent injury to the accused or some other person, to protect property from destruction or substantial damage, to avoid the prolonged suffering of a seriously injured animal, or if the accused was engaged in a reasonable and recognized act of training, handling, or disciplining the animal.

d. *Lesser included offenses.* Article 80–attempts

e. *Maximum punishments.* For abuse of a public animal: Bad-conduct discharge, confinement for 12 month, and forfeiture of two-thirds pay per month for 12 months. For abuse of all other animals: Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. *Sample specification.*

In that_____ (personal jurisdiction data), did (at/on board–location) (subject-matter jurisdiction data, if required), on or about _____, 20__, wrongfully abuse a(n) (public) animal by (kicking a drug detector dog in the nose) (_____).

9-11 Child Neglect

Concise Summary of Proposed Change: (a) Add a line to para. 100a, Part IV, MCM, indicating that child neglect may be prosecuted as a reckless endangerment or (b) Adopt the more comprehensive proposal previously advanced by the Army to the JSC in 2001 or (c) adopt a more limited proposal from *United States v. Vaughn*, 58 M.J. 29 (2003).

Rationale:

Pro:

- Already approved by the CAAF (codifies *Vaughn*)
- While less comprehensive than the 2001 Army proposal, will reach culpably neglectful conduct.
- Provides clear guidance to the field and will thus standardize prosecutions.

Con:

- May be unnecessary, in view of *Vaughn*
- Will leave some forms of neglect potentially unpunishable

Impact on other proposals for change or the military justice system: none noted

Other studies, articles, or information considered:

Add the following to Part IV, MCM

___ Article 134–(Child Neglect)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused wrongfully engaged in certain culpably negligent or reckless conduct;

(2) That the accused's conduct demonstrated disregard for a child's mental or physical health, safety, or welfare;

(3) That the child in question was under the age of 16 years; and

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

c. *Explanation.*

(1) *In general*. This offense is intended to prohibit and therefore deter child neglect that rises to the level of culpably negligent or reckless conduct.

(2) *Wrongfulness*. Conduct is wrongful when it is without legal justification or excuse.

(3) *Culpable negligence*. Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

(4) *Harm*. Actual physical or mental harm to the child is not required. The offense requires that the accused's actions reasonably could have caused physical or mental harm or suffering.

(5) *Age of victim as a factor.* While this offense may be committed against any child under 16, the age of the victim is a factor in the culpable negligence determination. Leaving a teenager alone for an evening would not be culpable (or even simple) negligence; leaving an infant or toddler for the same period might constitute culpable negligence. On the other hand, leaving a teenager without supervision for an extended period while the accused was on temporary duty outside commuting distance might constitute culpable negligence.

d. *Lesser included offenses.* None

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that _____(personal jurisdiction data), did, (at/on board–location) (subject matter jurisdiction data, if required) on or about _____, 20__, wrongfully act in a (culpably negligent) (reckless manner) with regard to _____(name of the victim), a child under the age of __ years, by (leaving the said _____unattended in his quarters for over ___ hours/days with no adult present in the home) (by failing to obtain medical care for the said _____'s diabetic condition) (_____), circumstances which demonstrated disregard for the said _____'s (physical health) (mental health) (safety) (welfare).

9-19. Correct disconnect between MCM, Part IV and case law in the time for compliance with orders for disobedience offenses.

Concise Summary of Proposed Change: The issue is time for compliance for personal orders. What is the "default" rule, immediate compliance or reasonable delay? Paragraph 14.c.(2)(g) currently reads, "If an order does not indicate the time within which it is to be complied with, either expressly or by implication, then a reasonable delay in compliance does not violate this article." On its face, the rule appears to presume a reasonable delay is authorized, unless the order implies or expressly states otherwise. Thus, the "default" rule, when the order is silent, is that reasonable delay is authorized. The relevant language was added to the Manual in 1984, although there is no discussion in the Analysis aside from the citation of cases.

Rationale:

Pro:

- Substituted language tracks current case law in the ACCA and the NMCCA and more clearly established the "default" rule that immediate compliance is the standard.

Con:

- May be construed to conflict with case law in the AFCCA.

Impact on other proposals for change or the military justice system: None

Other studies, articles, or information considered:

Case law supports a different "default" rule, or at least it confuses the stated rule. *U.S. v. Wilson*, 17 M.J. 1032, 1033 (ACMR 1984) states, "The dispositive rule for the case at bar is that immediate compliance is required for any order which does not explicitly or implicitly indicate that delayed compliance is authorized or directed." Shepherd's shows negative treatment for *Wilson*; however, I can't find any. Perhaps it refers to the fact that the COMA granted review (19 M.J. 40), then later vacated and denied the petition (19 M.J. 79). The above passage from *Wilson* has been favorably cited by the ACCA as recently as *U.S. v. Schwabauer*, 34 M.J. 709 (Army Ct. Crim. App. 1996).

The Navy-Marine Court follows the same rationale. *U.S. v. McLaughlin*, 14 M.J. 908 (NMCMR 1982) holds, "[I]mmediate, unhesitating compliance with lawful orders . . . is required *unless* the order clearly or inferentially indicates a longer time for compliance. Such a longer compliance time would be the specified time, *or* if no time is specified for the execution of the order, a reasonable time [emphasis in original]." The Army Court cited *McLaughlin* in *Wilson*.

Taken together, *Wilson* and *McLaughlin* reverse the presumption: no delay is authorized unless the order explicitly or implicitly says so.

The Air Force Court has reached a different result in a case involving only a 5-second delay between an order to put on a uniform and the accused's compliance. *U.S. v. Dellarossa*, 27 M.J. 860 (AFCMR 1989). It appears the majority relied heavily on the miniscule length of the delay and the apparent fact that the accused was not needed to perform duties at that time. Judge Murdock cited both *McLaughlin* and *Wilson* in a strong dissent.

Although it is possible to reconcile the rule and the case law in many cases (assuming immediate compliance is at least implied by most personal orders) the result is unnecessarily confusing. I have found this to be difficult to explain to the Basic Course students.

The proposed rule is more appropriate to the facts of most cases involving face-to-face disobedience of personal orders. For example, an accused ignores an officer's command to go draw his weapon or a platoon sergeant's command to "at ease" or "get over here." Commonly, such personal orders to do or cease doing specific acts do not specify a time for compliance.

Applying the rule as currently written to such a case, the court first determines whether a delay was implicit in the command, and if so, whether the accused's delay was reasonable. As a result, the court may inquire into whether immediate compliance was actually necessary at that time, as the court did (inappropriately in my view) in *Dellarossa*. Such inquiries are inappropriate because they have little bearing on whether the order itself authorized a delay, either implicitly or explicitly. Instead, they tend to question the necessity or validity of the order itself. If an order relates to a valid military purpose, then it should be immediately obeyed. As discussed in *McLaughlin* (citing COL Winthrop's treatise), this concept is central to military discipline and is consistent with other cases that presume orders are lawful and disobeyed at a subordinate's peril. *See* MCM, pt. IV, para. 14.c.(2)(a)(i); *U.S. v. Moore*, 58 M.J. 466, 467 (2003).

Under the proposed rule, a lawful order would presume immediate compliance. Even so, the defense would still be able to offer evidence that delay was authorized or that preliminary steps were necessary to execute the order.

9-19 Correct disconnect between MCM, Part IV and time for compliance in case law

14. Article 90—Assaulting or willfully disobeying superior commissioned officer

*****

c(2)(g) *Time for compliance.* When an order requires immediate compliance, an accused's declared intent not to obey and the failure to make any move to comply constitutes disobedience. Immediate compliance is required for any order which does not explicitly or implicitly indicate that delayed compliance is authorized or directed If an order requires performance in the future, an accused's present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may.

9-20 Consolidate Check Offenses

Concise Summary of Proposed Change: Consolidate check offenses (Part IV, MCM, Para. 9, Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds, and Part IV, MCM, Para. 68, Article 134—Check, worthless, making and uttering—by dishonorably failing to maintain funds). Currently, "bad check" offenses are punishable under Art. 123a or Article 134, primarily depending on the accused's mental state at the time the check was written or uttered. Consolidating the offenses under Art. 123a makes sense because the offenses all involve the use of checks to procure an item or to satisfy a past due obligation. The Code and the Manual should be as clear and user-friendly as possible, not only to attorneys, but also to commanders, supervisors and service members who refer to the Manual for guidance.

Rationale:

Pro:

- Streamlines the UCMJ by consolidating closely related "bad check" offenses under the same punitive article.
- Consolidation of logically related offenses makes the Manual and the military justice system more user-friendly by eliminating "traps for the unwary," particularly for non-lawyer service members who are expected to understand, apply, and comply with the provisions of the Manual. It also facilitates comparison of the related offenses to determine which offense is more appropriate in a given situation.

Con:

- Changes to text of 10 U.S.C. § 923a, UCMJ Article 123a (contained in subpara. a of proposal) will require Congressional action.
- Changes will require deletion of MCM, Part IV, para. 68 (Article 134—Check, worthless, making and uttering—by dishonorably failing to maintain funds).
- Changes will require modification to relevant portions of DA Pam 27-9, Military Judges' Benchbook.

Impact on other proposals for change or the military justice system: None.

Other studies, articles, or information considered: None

9-20 Consolidate check offenses

49. Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds

a. *Text.*

"Any person subject to this chapter who—

(1) for the procurement of any article or thing of value, with intent to defraud; or

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word "credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order; or

(3) for the procurement of any article or thing of value, payment of any past due obligation, or for any other purpose, makes and utters a certain check and subsequently fails to place or maintain sufficient funds in or credit with the drawee for payment in full upon its presentment for payment."

b. *Elements.*

(1) *Making, drawing, uttering, or delivering for the procurement of any article or thing of value, with intent to defraud.*

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose of procuring an article or thing of value;

(c) That the act was committed with intent to defraud; and

(d) That at the time of making, drawing, uttering, or delivery of the instrument the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

(2) *Making, drawing, uttering, or delivering for the payment of any past due obligation, or for any other purpose, with intent to deceive.*

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose;

(c) That the act was committed with intent to deceive; and

(d) That at the time of making, drawing, uttering, or delivering of the instrument, the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

(3) *Making and uttering a worthless check*.

(a) That the accused made and uttered a certain check;

(b) That the check was made and uttered for the purchase of a certain thing, in payment of a debt, or for a certain purpose;

(c) That the accused subsequently failed to place or maintain sufficient funds in or credit with the drawee bank for payment of the check in full upon its presentment for payment; and

(d) That this failure was dishonorable.

c. *Explanation.*

(1) *Making, drawing, uttering, or delivering with intent to defraud or deceive*.

(a) *Knowledge.* The accused must have knowledge, at the time the accused makes, draws, utters, or delivers the instrument, that the maker or drawer, whether the accused or another, has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of the instrument in full upon its presentment. Such knowledge may be proved by circumstantial evidence.

(b) *Intent to defraud.* "Intent to defraud" means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily.

(c) *Intent to deceive.* "Intent to deceive" means an intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage for oneself or for a third person, or of bringing about a disadvantage to the interests of the person to whom the representation was made or to interests represented by that person.

(d) *The relationship of time and intent.* Under this article, two times are involved: (a) when the accused makes, draws, utters, or delivers the instrument; and (b) when the instrument is presented to the bank or other depository for payment. With respect to (a), the accused must possess the requisite intent and must know that the maker or drawer does not have or will not have sufficient funds in, or credit with, the bank or the depository for payment of the instrument in full upon its presentment when due. With respect to (b), if it can otherwise be shown that the accused possessed the requisite intent and knowledge at the time the accused

made, drew, uttered, or delivered the instrument, neither proof of presentment nor refusal of payment is necessary, as when the instrument is one drawn on a nonexistent bank.

(e) *Statutory rule of evidence.* The provision of this article with respect to establishing prima facie evidence of knowledge and intent by proof of notice and nonpayment within 5 days is a statutory rule of evidence. The failure of an accused who is a maker or drawer to pay the holder the amount due within 5 days after receiving either oral or written notice from the holder of a check, draft, or order, or from any other person having knowledge that such check, draft, or order was returned unpaid because of insufficient funds, is prima facie evidence (a) that the accused had the intent to defraud or deceive as alleged; and (b) that the accused knew at the time the accused made, drew, uttered, or delivered the check, draft, or order that the accused did not have or would not have sufficient funds in, or credit with, the bank or other depository for the payment of such check, draft, or order upon its presentment for payment. Prima facie evidence is that evidence from which the accused's intent to defraud or deceive and the accused's knowledge of insufficient funds in or credit with the bank or other depository may be inferred, depending on all the circumstances. The failure to give notice referred to in the article, or payment by the accused, maker, or drawer to the holder of the amount due within 5 days after such notice has been given, precludes the prosecution from using the statutory rule of evidence but does not preclude conviction of this offense if all the elements are otherwise proved.

(2) *Making and uttering a worthless check*. This offense differs from the offenses in subparagraphs a(1) and (2) in that there need be no intent to defraud or deceive at the time of making, drawing, uttering, or delivery, and that the accused need not know at that time that the accused did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument. Mere negligence in maintaining one's bank balance is insufficient for this offense, for the accused's conduct must reflect bad faith or gross indifference in this regard. Dishonorable conduct of the accused is necessary. The failure to maintain funds must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate failure or grossly indifferent attitude toward one's bank account balance. When a check is made and uttered for the payment of a debt, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused's belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law which would affect the obligation of the accused to pay. The offense is not committed if the payee or payees involved are satisfied with the conduct of the payor with respect to payment. The length of the period of nonpayment and any denial of just obligations which the accused may have made may tend to prove that the accused's conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that the conduct was in fact dishonorable..

(3) *Written instruments.* The written instruments covered by this article include any check, draft (including share drafts), or order for the payment of money drawn upon

any bank or other depository, whether or not the drawer bank or depository is actually in existence. It may be inferred that every check, draft, or order carries with it a representation that the instrument will be paid in full by the bank or other depository upon presentment by a holder when due.

(4) *Bank or other depository.* “Bank or other depository” includes any business regularly but not necessarily exclusively engaged in public banking activities.

(5) *Making or drawing.* “Making” and “drawing” are synonymous and refer to the act of writing and signing the instrument.

(6) *Uttering or delivering.* “Uttering” and “delivering” have similar meanings. Both mean transferring the instrument to another, but “uttering” has the additional meaning of offering to transfer. A person need not personally be the maker or drawer of an instrument in order to violate this article if that person utters or delivers it. For example, if a person holds a check which that person knows is worthless, and utters or delivers the check to another, that person may be guilty of an offense under this article despite the fact that the person did not personally draw the check.

(7) *For the procurement.* “For the procurement” means for the purpose of obtaining any article or thing of value. It is not necessary that an article or thing of value actually be obtained, and the purpose of the obtaining may be for the accused’s own use or benefit or for the use or benefit of another.

(8) *For the payment.* “For the payment” means for the purpose or purported purpose of satisfying in whole or in part any past due obligation. Payment need not be legally effected.

(9) *For any other purpose.* “For any other purpose” includes all purposes other than the payment of a past due obligation or the procurement of any article or thing of value. For example, it includes paying or purporting to pay an obligation which is not yet past due. The check, draft, or order, whether made or negotiated for the procurement of an article or thing of value or for the payment of a past due obligation or for some other purpose, need not be intended or represented as payable immediately. For example, the making of a postdated check, delivered at the time of entering into an installment purchase contract and intended as payment for a future installment, would, if made with the requisite intent and knowledge, be a violation of this article.

(10) *Article or thing of value.* “Article or thing of value” extends to every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future.

(11) *Past due obligation.* A “past due obligation” is an obligation to pay money, which obligation has legally matured before making, drawing, uttering, or delivering the instrument.

(12) *Sufficient funds.* “Sufficient funds” refers to a condition in which the account balance of the maker or drawer in the bank or other depository at the time of the presentment of the instrument for payment is not less than the face amount of the instrument and has not been rendered unavailable for payment by garnishment, attachment, or other legal procedures.

(13) *Credit.* "Credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of the check, draft, or order. An absence of credit includes those situations in which an accused writes a check on a nonexistent bank or on a bank in which the accused has no account.

(14) *Upon its presentment.* "Upon its presentment" refers to the time the demand for payment is made upon presentation of the instrument to the bank or other depository on which it was drawn.

(15) *Affirmative defense.* Honest mistake is an affirmative defense to offenses under this article. *See* R.C.M. 916(j).

d. *Lesser included offenses.*

(1) *Making, drawing, uttering, or delivering with intent to defraud or deceive*.

(a) Article 123a—making and uttering a worthless check

(b) Article 80—attempts

(2) *Making and uttering a worthless check*. Article 80—attempts

e. *Maximum punishment.*

(1) *Making, drawing, uttering, or delivering for the procurement of any article or thing of value, with intent to defraud, in the face amount of:*

(a) *$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *More than $500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Making, drawing, uttering, or delivering for the payment of any past due obligation, or for any other purpose, with intent to deceive.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Making and uttering a worthless check.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Making, drawing, uttering, or delivering for the procurement of any article or thing of value, with intent to defraud.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____20_____, with intent to defraud and for the procurement of (lawful currency) (and) (_____ (an article) (a thing) of value), wrongfully and unlawfully ((make (draw)) (utter) (deliver) to _____,) a certain (check) (draft) (money order) upon the (_____Bank) (_____ depository) in words and figures as follows, to wit: _____, then knowing that (he/she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

(2) *Making, drawing, uttering, or delivering for the payment of any past due obligation, or for any other purpose, with intent to deceive.*

In that _____(personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20_____, with intent to deceive and for the payment of a past due obligation, to wit: _____ (for the purpose of _____) wrongfully and unlawfully ((make) (draw)) (utter) (deliver) to _____, a certain (check) (draft) (money order) for the payment of money upon (_____Bank) (_____depository), in words and figures as follows, to wit: _____, then knowing that (he/she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

(3) *Making and uttering a worthless check.*

In that _____(personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, make and utter to _____ a certain check, in words and figures as follows, to wit: _____, (for the purchase of _____) (in payment of a debt) (for the purpose of _____), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in or credit with the (_____ Bank) (_____depository) for the payment of such check in full upon its presentment for payment.

9-21 Consolidate Arson and Burning with Intent to Defraud

Concise Summary of Proposed Change: Consolidate arson (Art. 126) and burning with intent to defraud (Art. 134).

Rationale: A commander or judge advocate considering charging options in arson cases may miss one or the other of the offenses available. Modernizing the UCMJ should include incorporating offenses in Art. 134 with similar offenses in the punitive articles of the Code. It will facilitate comparison of the alleged misconduct with the full range of charging options available.

Impact on other proposals for change: None

Other studies, articles, or information considered: None

Article 126—Arson

a. *Text.*
"(a) 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 the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.
(b) Any person subject to this chapter who willfully and maliciously burns or sets fire to certain property owned by a certain person or organization, with the intent to defraud a certain person or organization, is guilty of arson with intent to defraud, and shall be punished as a court-martial may direct."
(c) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a) or subsection (b), is guilty of simple arson and shall be punished as a court-martial may direct."

b. *Elements.*

(1) *Aggravated arson.*

(a) *Inhabited dwelling.*

(i) That the accused burned or set on fire an inhabited dwelling;
(ii) That this dwelling belonged to a certain person and was of a certain value; and
(iii) That the act was willful and malicious.

(b) *Structure.*

(i) That the accused burned or set on fire a certain structure;
(ii) That the act was willful and malicious;
(iii) That there was a human being in the structure at the time;
(iv) That the accused knew that there was a human being in the structure at the time; and
(v) That this structure belonged to a certain person and was of a certain value.

(2) *Arson with Intent to Defraud*.

(a) That the accused burned or set fire to certain property owned by a certain person or organization;
(b)That such burning or setting on fire was with the intent to defraud a certain person or organization; and
(c) That the act was willful and malicious.

(3) Simple arson.

(a) That the accused burned or set fire to certain property of another;
(b) That the property was of a certain value; and
(c) That the act was willful and malicious.

c. *Explanation.*

(1) *In general.* In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.

(2) *Aggravated arson.*

(a) *Inhabited dwelling.* An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. A person may be guilty of aggravated arson of the person's dwelling, whether as owner or tenant.

(b) *Structure.* Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, when the offender knows that there is a human being inside at the time. It may be that the offender had this knowledge when the nature of the structure —as a department store or theater during hours of business, or other circumstances— are shown to have been such that a reasonable person would have known that a human being was inside at the time.

(c) *Damage to property.* It is not necessary that the dwelling or structure be consumed or materially injured; it is enough if fire is actually communicated to any part thereof. Any actual burning or charring is sufficient, but a mere scorching or discoloration by heat is not.

(d) *Value and ownership of property.* For the offense of aggravated arson, the value and ownership of the dwelling or other structure are immaterial, but should ordinarily be alleged and proved to permit the finding in an appropriate case of the included offense of simple arson.

(3) *Arson with intent to Defraud*. Arson with the intent to defraud is the burning of real or personal property with the intent to defraud another by the anticipation of making or filing of a claim, suit or taking other action in order for the actor or another to be reimbursed, recompensed or otherwise financially benefit as a result of the burning. Unlike aggravated or simple arson, arson with intent to defraud is a specific intent crime.

(4) *Simple arson.* "Simple arson" is the willful and malicious burning or setting fire to the property
of another under circumstances not amounting to aggravated arson. The offense includes burning or setting fire to real or personal property of someone other than the offender.

d. *Lesser included offenses.*

(1) *Aggravated arson.*

(a) Article 126—arson with intent to defraud

(b) Article 126—simple arson

(c) Article 109—wasting, spoiling, destroying non-military property

(d)Article 80—attempts

(2) *Arson with intent to defraud*

(a) Article 126–simple arson

(b) Article 109–wasting, spoiling, destroying non military property

(c) Article 80–attempts

(3) *Simple arson.* Article 80—attempts

e. *Maximum punishment.*

(1) *Aggravated arson.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) *Arson with intent to defraud.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3)*Simple arson, where the property is—*

(a) *Of a value of $500.00 or less.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of a value of more than $500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Aggravated arson.*

(a) *Inhabited dwelling.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ , 20__, willfully and maliciously (burn) (set on fire) an inhabited dwelling, to wit: (the residence of) ( ), (the property of) of a value of (about)$_____ .

(b) *Structure.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) , on or about _____ , 20__, willfully and maliciously (burn) (set on fire), knowing that a human being was therein at the time, (the Post Theater) (, the property of_____), of a value of (about) $_____ .

(2) *Arson with intent to defraud*.

In that_____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20__, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of _____, with intent t o defraud (the insurer thereof, to wit:) (_____)

(3) *Simple arson.*

In that _____ (personal jurisdiction data), did, (at/on board— location) (subject-matter jurisdiction data, if required), on or about _____, 20__, willfully and maliciously (burn) (set fire to _____) (an automobile) (_____), the property of _____ , of a value of (about) $_____ .

9-22 Consolidate Theft Offenses

Concise Summary of Proposed Change: Consolidate larceny and false pretenses, and eliminates separate "theories" of larceny, while modernizing the examples in the MCM.

Rationale: Currently, theft/wrongful appropriation of tangible property is punishable under Art. 121, while theft of services is punishable under Art. 134. Consolidating the offenses under Art. 121 makes sense because the offenses all involve unlawful taking, withholding, or obtaining from another, and many of the same principles apply to all the offenses. The Code and the Manual should be as clear and user-friendly as possible, not only to attorneys, but also to commanders, supervisors, and service members who refer to the Manual for guidance.

Impact on other proposals for change: None

Other studies, articles, or information considered: None

46. Article 121—Theft

a. *Text.*

"(a) Any person subject to this chapter who unlawfully appropriates, by any means, from the possession of the owner or from any other person any money, personal property, or article of value of any kind—"

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(3) with intent to defraud to appropriate services or knowingly use other means to avoid payment for services is guilty of theft of services.

(b) Any person found guilty of theft shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Larceny.*

(a) That the accused unlawfully appropriated certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the unlawful appropriation by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

[Note: If the property is alleged to be military property, as defined in paragraph 32c(1), add the following element]

(e) That the property was military property.

(2) *Wrongful appropriation.*

(a) That the accused unlawfully appropriated certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the unlawful appropriation by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

(3) *Theft of services*.

(a) That the accused wrongfully obtained certain services;

(b) That the obtaining was done by using false pretenses with intent to defraud or by knowingly using other means to avoid payment for the services; and

(c) That the services were of a certain value.

c. *Explanation.*

(1) *Larceny.*

(a) *In general*. The act of appropriation includes exercising unauthorized control over the property. Appropriation may include a taking, an obtaining, and a withholding. An unlawful taking with the intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various types of larceny under Article 121 may be charged and proven under a specification alleging that the accused "did steal" the property in question.

(b) *Taking, obtaining, or withholding*. There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; property is not "obtained" by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it is sufficient if accompanied by the requisite intent. A person may "obtain" the property of another by acquiring possession without title, and one who already has possession of the property of another may "obtain" it by later acquiring title to it. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully. *See* subparagraph c(1)(f) below. However, acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of "withholds." Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on that basis alone. The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

(c) *Ownership of the property.*

(i) *In general.* Article 121 requires that the taking, obtaining, or withholding be from the possession of the owner or of any other person. Care, custody, management, and control are among the definitions of possession.

(ii) *Owner.* "Owner" refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which may be involved in the particular case. For instance, an organization is the true owner of its funds as against the custodian of the funds charged with the larceny thereof.

(iii) *Any other person.* "Any other person" means any person—even a person who has stolen the property—who has possession or a greater right to possession than the accused. In pleading a violation of this article, the ownership of the property may be alleged to have been in any person, other than the accused, who at the time of the theft was a general owner or a special owner thereof. A general owner of property is a person who has title to it, whether or not that person has possession of it; a special owner, such as a borrower or hirer, is one who does not have title but who does have possession, or the right of possession, of the property.

(iv) *Person.* "Person," as used in referring to one from whose possession property has been taken, obtained, or withheld, and to any owner of property, includes (in addition to a natural person) a government, a corporation, an association, an organization, and an estate. Such a person need not be a legal entity.

(d) *Unlawfulness of the taking, obtaining, or withholding.* The taking, obtaining, or withholding of the property must be unlawful. As a general rule, a taking or withholding of property from the possession of another is unlawful if done without the consent of the other, and an obtaining of property from the possession of another is unlawful if the obtaining is by false pretense. However, such an act is not unlawful if it is authorized by law or apparently lawful superior orders, or, generally, if done by a person who has a right to the possession of the property either equal to or greater than the right of one from whose possession the property is taken, obtained, or withheld. An owner of property who takes or withholds it from the possession of another, without the consent of the other, or who obtains it therefrom by false pretense, does so unlawfully if the other has a superior right—such as a lien—to possession of the property. A person who takes, obtains, or withholds property as the agent of another has the same rights and liabilities as does the principal, but may not be charged with a guilty knowledge or intent of the principal which that person does not share.

(e) *False pretense.* With respect to obtaining property or services by false pretense, the false pretense may be made by means of any act, word, symbol, or token. The pretense must be in fact false when made and when the property or service is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth. A false pretense is a false representation of past or existing fact. In addition to other kinds of facts, the fact falsely represented by a

person may be that person's or another's power, authority, or intention. For example, a knowingly false representation that a person intends to perform a certain act in the future is a false pretense, because the person's present intention is an existing fact. Although the pretense need not be the sole cause inducing the owner to part with the property or service, it must be an effective and intentional cause of the obtaining. A false representation made after the property or service was obtained will not result in a violation of Article 121. A larceny or theft of services is committed when a person obtains the property of another or service by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to the property or with the service. Thus, a person who gets another's watch by pretending that it will be borrowed briefly and then returned, but who really intends to sell it, is guilty of larceny.

(f) *Intent.*

(i) *In general.* The offense of larceny requires that the taking, obtaining, or withholding by the thief be accompanied by an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to the thief's own use or the use of any person other than the owner. These intents are collectively called an intent to steal. Although a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent. For example, if a person rents another's vehicle, later decides to keep it permanently, and then either fails to return it at the appointed time or uses it for a purpose not authorized by the terms of the rental, larceny has been committed, even though at the time the vehicle was rented, the person intended to return it after using it according to the agreement.

(ii) *Inference of intent.* An intent to steal may be proved by circumstantial evidence. Thus, if a person secretly takes property, hides it, and denies knowing anything about it, an intent to steal may be inferred; if the property was taken openly and returned, this would tend to negate such an intent. Proof of sale of the property may show an intent to steal, and therefore, evidence of such a sale may be introduced to support a charge of larceny. An intent to steal may be inferred from a wrongful and intentional dealing with the property of another in a manner likely to cause that person to suffer a permanent loss thereof.

(iii) *Special situations.*

(A) *Motive does not negate intent.* The accused's purpose in taking an item ordinarily is irrelevant to the accused's guilt as long as the accused had the intent required under subparagraph c(1)(f)(i) above. For example, if the accused wrongfully took property as a "joke" or "to teach the owner a lesson" this would not be a defense, although if the accused intended to return the property, the accused would be guilty of wrongful appropriation, not larceny. When a person takes property intending only to return it to its lawful owner,

as when stolen property is taken from a thief in order to return it to its owner, larceny or wrongful appropriation is not committed.

(B) *Intent to pay for or replace property not a defense.* An intent to pay for or replace the stolen property is not a defense, even if that intent existed at the time of the theft. If, however, the accused takes money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount of money, the offense of larceny is not committed although wrongful appropriation may be.

(C) *Return of property not a defense.* Once a larceny is committed, a return of the property or payment for it is no defense. *See* subparagraph c(2) below when the taking, obtaining, or withholding is with the intent to return.

(g) *Value.*

(i) *In general.* Value is a question of fact to be determined on the basis of all of the evidence admitted.

(ii) *Government property.* When the stolen property is an item issued or procured from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. *See* Mil. R. Evid. 803(17). However, the stolen item must be shown to have been, at the time of the theft, in the condition upon which the value indicated in the official price list is based. The price listed in the official publication is not conclusive as to the value of the item, and other evidence may be admitted on the question of its condition and value.

(iii) *Other property.* As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft. If this property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States at the time of the theft, or by its replacement cost at that time, whichever is less. Market value may be established by proof of the recent purchase price paid for the article in the legitimate market involved or by testimony or other admissible evidence from any person who is familiar through training or experience with the market value in question. The owner of the property may testify as to its market value if familiar with its quality and condition. The fact that the owner is not an expert of the market value of the property goes only to the weight to be given that testimony, and not to its admissibility. *See* Mil. R. Evid. 701. When the character of the property clearly appears in evidence—for instance, when it is exhibited to the court-martial—the court-martial, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of $500.00, the court-martial may find a value of more than $500.00. Writings representing value may be considered to have the value—even though contingent—which they represented at the time of the theft.

(iv) *Limited interest in property.* If an owner of property or someone acting in the owner's behalf steals it from a person who has a superior, but limited, interest in the property, such as a lien, the value for punishment purposes shall be that of the limited interest.

(h) *Miscellaneous considerations.*

(i) *Lost property.* A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the general or special owner, or through which such identity may be traced, is furnished by the character, location, or marketing of the property, or by other circumstances.

(ii) *Multiple article larceny.* When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

(iii) *Special kinds of property which may also be the subject of larceny.* Included in property which may be the subject of larceny is property which is taken, obtained, or withheld by severing it from real estate and writings which represent value such as commercial paper.

(iv) *Credit, Debit, and Electronic Transactions.* Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them. Such use to obtain money or a negotiable instrument (e.g., withdrawing cash from an automated teller or a cash advance from a bank) is usually a larceny of money from the entity presenting the money or a negotiable instrument. For the purpose of this section, the term 'credit, debit, or electronic transaction' includes the use of an instrument or device, whether known as a credit card, debit card, automated teller machine (ATM) card or by any other name, including access devices such as code, account number, electronic serial number or personal identification number, issued for the use in obtaining money, goods, or anything else of value.

(2) *Wrongful appropriation.*

(a) *In general.* Wrongful appropriation requires an intent to temporarily—as opposed to permanently—deprive the owner of the use and benefit of, or appropriate to the use of another, the property wrongfully taken, withheld, or obtained. In all other respects wrongful appropriation and larceny are identical.

(b) *Examples.* Wrongful appropriation includes: taking another's automobile without permission or lawful authority with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty with intent to use it on a hunting trip and later return it; and while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from government service by deviating

from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use. An inadvertent exercise of control over the property of another will not result in wrongful appropriation. For example, a person who fails to return a borrowed boat at the time agreed upon because the boat inadvertently went aground is not guilty of this offense.

(3) *Theft of services*.

(a) *In general*. This offense is similar to the offense of larceny, except that the object of the obtaining is services (for example, telephone or television cable service, internet service, utilities, transportation, medical treatment, repair work or use of facilities) rather than money, personal property, or other tangible articles of value of any kind. *See* paragraph 49c(14) for a definition of "intent to defraud."

(b) *False pretense*. *See* subparagraph c(1)(e) above.

d. *Lesser included offenses.*

(1) *Larceny.*

(a) Article 121—wrongful appropriation

(b) Article 80—attempts

(2) *Larceny of military property.*

(a) Article 121—wrongful appropriation

(b) Article 121—larceny of property other than military property

(c) Article 80—attempts

(3) *Wrongful appropriation.* Article 80—attempts

(4) *Theft of services*. Article 80—attempts

e. *Maximum punishment.*

(1) *Larceny.*

(a) *Military property of a value of $500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Property other than military property of a value of $500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Military property of a value of more than $500 or of any military motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(d) *Property other than military property of a value of more than $500 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph e(1)(c).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(2) *Wrongful appropriation.*

(a) *Of a value of $500.00 or less.* Confinement for 3 months, and forfeiture of two-thirds pay per month for 3 months.

(b) *Of a value of more than $500.00.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Of any motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Theft of services*.

(a) *Of a value of $500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Of a value of more than $500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Larceny.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20_____, steal _____, (military property), of a value of (about) $_____, the property of _____.

(2) *Wrongful appropriation.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20_____, wrongfully appropriate _____, of a value of (about) $_____, the property of _____.

(3) *Theft of services*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20_____, with intent to defraud, did wrongfully obtain from _____, services, of a value of (about) $_____, to wit: _____, by (falsely representing to _____ that _____, then knowing that the representation was false) (knowingly switching the television cable connection) (knowingly splicing into the telephone line) (knowingly _____).

9-24 Consolidate Housebreaking and Unlawful Entry

Concise Summary of Proposed Change: Consolidates housebreaking and unlawful entry offenses.

Rationale: Currently, housebreaking is punishable under Art. 130, while unlawful entry is punishable under Art. 134. Consolidating the offenses under Art. 130 makes sense because the offenses all involve invasion of a property interest, and many of the same principles apply to both the offenses. Placing the Art. 134 offense of unlawful entry within the statutory prohibition against housebreaking will permit judge advocates, commanders, and others to compare the conduct in question against the full range of unlawful entry offenses and determine which one best fits the conduct alleged. The Code and the Manual should be as clear and user-friendly as possible, not only to attorneys, but also to commanders, supervisors, and service members who refer to the Manual for guidance.

Impact on other proposals for change: None

Other studies, articles, or information considered: None

Article 130 – Housebreaking and unlawful entry

a. *Text*.

(1) Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who unlawfully enters the real property or personal property of another, which amounts to a structure used for habitation or storage, is guilty of unlawful entry and shall be punished as a court-martial may direct.

b. *Elements*.

(1) *Housebreaking*.

(a) That the accused unlawfully entered a certain building or structure of a certain other person; and

(b) That the unlawful entry was made with the intent to commit a criminal offense therein.

(2) *Unlawful entry*.

(a) That the accused entered a structure usually used for habitation or storage;

(b) That the structure was the real or personal property of another; and

(c) That such entry was unlawful;

c. *Explanation*.

(1) *Housebreaking*.

(a) Scope of the offense. The offense of housebreaking is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that the place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit one of the offenses made punishable under Articles 118 through 128.

(b) Intent. The intent to commit some criminal offense (but not necessarily an offense punishable under Articles 118 through 128) is an essential element of housebreaking and must be alleged and proved to support a conviction of the offense. If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit the offense at the time of the entry.

(c) Criminal offense. Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a "criminal offense."

(d) Building, structure. "Building" includes a room, shop, store, office, or apartment in a building. "Structure" refers only to those structures which are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, or enclosed truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry.

(e) Entry. *See* paragraph 55c(1)(c).

(f) Separate offense. If the evidence warrants, the intended offense in the housebreaking specification may be separately charged.

(2) *Unlawful entry*.

(a) Scope of the offense. The offense of unlawful entry is broader than housebreaking in that the place entered may be real property or personal property which amounts to a structure used for habitation or storage; and it is not essential that the entry be made with the intent to commit a criminal offense therein.

(b) Entry. *See* paragraph 55c(1)(c).

(c) Unlawful. An entry is "unlawful" if made without the consent of any person authorized to consent to entry or without other lawful authority.

(d) Intent. No specific intent or breaking is required for this offense.

(e) Property protected. The property protected against unlawful entry includes real property and the type of personal property which amounts to a structure usually used for habitation or storage. It would not include an aircraft, automobile, tracked vehicle, or a person's locker, even though used for storage purposes. However, depending on the circumstances, an intrusion into such property may be prejudicial to good order and discipline.

d. *Lesser included offenses*.

(1) *Housebreaking*.

(a) Article 130(b) – unlawful entry

(b) Article 80 – attempts

(2) *Unlawful entry*. Article 80 – attempts.

e. *Maximum punishment*.

(1) *Housebreaking*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Unlawful entry*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications*.

(1) *Housebreaking*.

In that _____ (personal jurisdiction data), did, at _____, (subject-matter jurisdiction data, if required), on or about _____20_____, unlawfully enter a (dwelling) (room) (bank) (store) (warehouse) (shop) (tent) (stateroom) (_____), the property of _____, with intent to commit a criminal offense, to wit: _____, therein.

(2) *Unlawful entry*.

In that _____ (personal jurisdiction data), did, at _____, (subject-matter jurisdiction data, if required), on or about _____20_____, unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) (_____) of _____.

9-25 Consolidate Solicitation Offenses

Concise Summary of Proposed Change:

Consolidate solicitation offenses (Part IV, MCM, Para. 6, Article 82—Solicitation, and Part IV, MCM, Para. 105, Article 134—Soliciting another to commit an offense). Currently, solicitation is punishable under either Art. 82 or Art. 134, depending on the offense solicited. Consolidating the offenses under Article 82 makes sense because there is no sound reason to maintain the separate offenses. The Code and the Manual should be as clear and user-friendly as possible, not only to attorneys, but also to commanders, supervisors and service members who refer to the Manual for guidance.

Rationale:

Pro:

- Streamlines the UCMJ by consolidating closely related solicitation offenses under the same punitive article.
- Consolidation of logically related offenses makes the Manual and the military justice system more user-friendly by eliminating "traps for the unwary," particularly for non-lawyer service members who are expected to understand, apply, and comply with the provisions of the Manual. It also facilitates comparison of the related offenses to determine which offense is more appropriate in a given situation.

Con:

- Changes to text of 10 U.S.C. § 882, UCMJ Article 82 (contained in subpara. a of proposal) will require Congressional action.
- Changes will require deletion of MCM, Part IV, para. 105 (Article 134—Soliciting another to commit an offense).
- Changes will require modification to relevant portions of DA Pam 27-9, Military Judges' Benchbook.

Impact on other proposals for change or the military justice system: None.

Other studies, articles, or information considered: None

9-25 Consolidate Solicitation and Art. 82

6. Article 82—Solicitation

a. *Text.*

"(a) Any person subject to this chapter who solicits or advises another or other to desert in violation of section 885 of this title (Article 85) or mutiny in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (Article 99) or sedition in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

(c) Any person subject to this chapter who solicits or advises another or others to commit an offense under the code other than those listed in subsections (a) and (b) shall be punished as a court-martial may direct."

b. *Elements.*

(1) *Solicitation—desertion, mutiny, sedition, or misbehavior before the enemy.*

(a) That the accused solicited or advised a certain person or persons to commit desertion, mutiny, sedition, or misbehavior before the enemy; and

(b) That the accused did so with the intent that the offense actually be committed.

[Note: If the offense solicited or advised was attempted or committed, add the following element]

(c) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

(2) *Solicitation—offenses other than desertion, mutiny, sedition, or misbehavior before the enemy.*

(a) That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than desertion (Article 85), mutiny (Article 94), sedition (Article 94) and misbehavior before the enemy (Article 99); and

(b) That the accused did so with the intent that the offense actually be committed.

c. *Explanation.*

(1) *Instantaneous offense.* The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit an offense under the code. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(2) *Form of solicitation.* Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit an offense under the code may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) *Separate offenses*. Some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Articles 82. When the accused's act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense—for example, pandering (*see* paragraph 97) and obstruction of justice (*see* paragraph 96) in violation of Article 134.

(4) *Commission of solicited offense*. If the offense solicited was actually committed, *see also* paragraph 1.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Solicitation—desertion, mutiny, sedition, or misbehavior before the enemy.* If the offense solicited or advised is committed or (in the case of soliciting desertion or mutiny) attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or (in the case of soliciting desertion or mutiny) attempted, then the following punishment may be imposed:

(a) To desert—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(b) To mutiny—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(c) To commit an act of misbehavior before the enemy—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(d) To commit an act of sedition—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Solicitation—offenses other than desertion, mutiny, sedition, or misbehavior before the enemy.* Any person subject to the code who is found guilty of soliciting or advising another person to commit an offense which, if committed by one subject to the code, would be punishable under the code, shall be subject to the maximum punishment authorized for the offense solicited or advised, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years. However, any person subject to the code who is found guilty of soliciting or advising another person to commit the offense of espionage (Article 106a) shall be subject to any punishment, other than death, that a court-martial may direct.

f. *Sample specifications.*

(1) *For soliciting desertion (Article 85) or mutiny (Article 94).*

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____20_____, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise), _____ (and _____) to (desert in violation of Article 85) (mutiny in violation of Article 94)

[*Note: If the offense solicited or advised is attempted or committed, add the following at the end of the specification:*]

and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____20_____, (at/on board—location), (attempted) (committed) by _____ (and_____).

(2) *For soliciting an act of misbehavior before the enemy (Article 99) or sedition (Article 94).*

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____20_____, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise), _____ (and _____) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94)

[*Note: If the offense solicited or advised is committed, add the following at the end of the specification:*]

and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____20_____, (at/on board—location), committed by _____ (and_____).

(3) *For soliciting an offense other than desertion (Article 85), mutiny (Article 94), sedition (Article 94) or misbehavior before the enemy (Article 99).*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20_____, wrongfully (solicit) (advise) _____ (to disobey a general regulation, to wit: _____) (to steal _____, of a value of (about) $_____, the property of _____) (to _____), by _____.

9-26 Make Reporting for Duty with Drug Metabolites in Excess of DoD Cutoffs a Regulatory Violation Punishable under Article 92

Concise Summary of Proposed Change: The change is designed to solve the jurisdictional issue that exists for reserve personnel who are subject to urinalysis at drill or AT periods. .

Rationale: Because the use of the illegal drugs cannot be shown to have occurred on active duty, there is no jurisdiction under the UCMJ for a charge under Art. 112a. Analogizing to the offense under AR 600-85 of reporting for duty with alcohol in one's system greater than a specified limit, this change would permit a prosecution for reporting for duty with a level of metabolite of a controlled substance an offense. Because reporting for duty involves being on duty for purposes of Art. 2, reserve personnel could be prosecuted. Art. 112a prosecutions or NJP would remain the norm for those active duty service members who test positive for controlled substances

Pro:

- Enables prosecution or NJP for reservists reporting for active duty who test positive for controlled substances, thus creating similar penalties for both active and reserve personnel.

- The administrative elimination system in the USAR is extremely cumbersome, taking years between a positive urinalysis and any adverse action.

- To be effective as a deterrent, punishment should swiftly follow misconduct.

Con:

- Will likely increase the number of reserve NJP and courts-martial, placing additional burdens on the military justice system.

- May be perceived by the CAAF as an "end run" around Art. 112a's requirements of knowing use.

Impact on other proposals for change: None

Other studies, articles, or information considered: *United States v. Chodara*, 29 M.J. 943 (CMR 1990).

Amend Army Regulation 600-85, *Army Substance Abuse Program (ASAP)* (1 October 2001) –

Paragraph 1-34 – add subparagraph d –

d. ARNG and USAR soldiers ordered to AD who are tested pursuant to paragraph 1-35c of this regulation, as well as ARNG and USAR soldiers tested pursuant to chapters 12 and 13 of this regulation, will not possess in their body (to include urine, blood, and hair) controlled substances, as listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. § 812), or the metabolites of these controlled substances, at levels in excess of the levels set by the Deputy Assistant Secretary of Defense (Drug Enforcement Policy and Support) (see Department of Defense Instruction 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program* (December 9, 1994), section E1.6.2). Any violation of this provision provides a basis for disciplinary action under the UCMJ and a basis for administrative action, to include characterization of service at separation. Only results from tests administered pursuant to this regulation may be used in support of disciplinary or administrative actions. Nothing in this regulation will be interpreted to mean that impairment does not exist if the level of controlled substance or controlled substance metabolite is below the established cutoff level.

Proposal 10-3 Make All Sentences Except Death and Discharge Effective Immediately Upon Sentencting (See 12-1 Revised Post-Trial Process for MCM changes)

Concise Summary of Proposed Change: Article 57 provides for the effective dates of sentences of courts-martial. Currently, all sentences are effective on the date ordered executed with the exception of confinement, any forfeiture of pay and allowances, and reduction in grade. A sentence to confinement runs immediately upon the date of sentence. Any forfeiture of pay and allowances or reduction in grade takes effect on the earlier of either 14 days from the date adjudged or the date approved by the convening authority. This proposal would make all sentences effective on the date adjudged, with the exception of death or punitive discharge

Rationale:

Pros:

- Provides a consistent effective date for those punishments not requiring appellate review.
- Eliminates the 14 day waiting period for forfeitures and reduction in rank. The 14 day grace period is negligible in practice; the accused should have his or her affairs in order at the time of the court-martial, and in fact does so for more serious concerns, such as care of minor children.
- There would be no question of the correct day when forfeitures/reduction occurred. Makes the Report of Result of Trial (DA Form 4430) a "one size fits all" document.
- Still retains CA deferral and waiver process – just eliminates the 14 day grace period.
- If CA disapproves confinement or forfeitures, soldier will still receive back pay – back pay will be from date of sentence instead of 14 days from date of sentence currently in place.
- Makes hard labor without confinement and restriction sentences consistent with the more severe (and immediately effective) confinement sentences

Cons:

- Reprimand will be hard to execute immediately. The court-martial will have to draft the reprimand as part of the sentence. Court members currently impose restriction, and must specify the limits of such restriction.

- Hard labor without confinement and restriction are without remedy if CA disapproves those punishments. There is no way to "make the accused whole" unlike providing back pay if forfeitures and/or confinement are disapproved, but that is similar to what happens when an accused is confined immediately

- Have to convince Congress to amend Articles 57 and 58(b) after just being amended in 1996. Specifically, it will be hard to delete the 14 day grace period. "As early as March 1988, the JSC adopted a Navy proposal to amend Article 57(a) to make forfeitures of pay and allowances and reduction in grade effective on announcement of sentence. Initially, the DOD suggested to Congress that forfeitures and reductions take effect on announcement of sentence. Congress, however, opted first for a twenty day delay. The rationale was that a twenty day grace period would give an accused adequate time to ask the convening authority for a deferment of any forfeitures or a reduction. A subsequent amendment offered by Senator Barbara Boxer, and approved by the conference committee and then both houses, reduced this twenty day period to fourteen days."[11]

Sources.

a. *Notes From the Field: The Joint Service Committee Report on Military Justice*, ARMY LAWYER, March 1996, at 138.

b. *The Journey is the Gift: Recent Developments in the Post-Trial Process*, ARMY LAWYER, May 2001, at 81.

Other Necessary Changes.

a. Amend Article 57.

b. Amend R.C.M. 1113 to clarify all sentences are executed immediately with the exception of death and discharge.

[11] Lieutenant Colonel Fred Borch, *Notes From the Field: Joint Service Committee on Military Justice Report*, ARMY LAW., Mar. 1996, at 140.

10-6 Increase Maximum Punishments for Child Victim Offenses and
10-13 Sentence Enhancers for Use of Weapons

Concise Summary of Proposed Change: Increase maximum punishments for offenses for aggravated assault, battery, assaults on children, and maiming.
Increase confinement for the following offenses:

Aggravated assault w/ dangerous weapon or means likely: 8 years;

Aggravated assault by intentional infliction of GBH: 10 years;

Maiming: make a 10 year offense if general intent to injure and victim is a child, but make maiming a 20 year offense, for any age victim, if done with the intent to disfigure or disable (like federal statute);

Battery: 1 year

Assault on a child:

Maiming with intent to injure: creates an aggravating maiming offense for intent to torture or injure.

Rationale. The table below compares the **current** maximum punishments under the UCMJ and federal criminal law:

Offense	UCMJ	Title 18, U.S.C.
Battery	BCD, 6 months	6 months
Battery of a child	DD, 2 years	1 year
Battery of a child resulting in substantial bodily injury	*	5 years
Agg assault with a dangerous weapon or means likely to produce death or GBH	DD, 3 years (8 years with a loaded firearm).	*
Assault with a dangerous weapon, with intent to do bodily harm	*	10 years
Agg assault by intentional infliction of GBH	DD, 5 years (10 years with a loaded firearm).	*
Assault resulting in serious bodily injury	*	10 years
Maiming with intent to injure Maiming with intent to injure a child under age 16 Maiming with intent to torture or disfigure	DD, 7 years DD, 10 years DD, 20 years	20 years†

* Not specifically addressed in the statutory scheme.
†Requires “intent to torture, maim, or disfigure”

Generally, the federal scheme for assaultive offenses appears to increase punishment based on the amount of harm, while the UCMJ tends to do so based on the accused’s culpability. Under either rationale, an accused who commits such offenses against a child may deserve greater punishment. Considering the facts involved in some of the more egregious cases—particularly maiming and intentional affliction of GBH, where both harm and culpability are extraordinarily high—the UCMJ punishments seem to be

light compared with those in the federal scheme. Yet the UCMJ currently increases the max punishment only for battery of a child.

Impact on other proposals for change. None

Other studies, articles, or information considered. 18 U.S.C. §§113-14.

10-13 Sentence Enhancers for Weapons Use

Concise Summary of Proposed Change: Add sentence enhancers for use or possession of weapons during crimes of violence and other specified offenses.

Rationale: The use or possession of a weapons during the commission of violent crimes certainly increases the potential for harm to both victims and bystanders. A person who consciously decides to use or possesses weapons during these offenses is also arguably more culpable. Thus, under either a harm or culpability-based rationale, the person may deserve a greater punishment. Federal law appears to recognize these tendencies by providing enhanced punishment for use of weapons during the commission of various offenses, including assault, robbery, mail offenses, violations of protective orders, and domestic violence offenses. Further, 18 U.S.C. § 924 provides increased punishments (depending on the type of firearm and how it was used) for the use of a firearm during any crime of violence or drug trafficking crime. Currently, the UCMJ specifically provides enhanced punishment for the use of weapons or firearms only under Article 128.

Impact on other proposals for change. None.

Other studies, articles, or information considered. 18 U.S.C. §§ 16, 111-13, 924, 2113-14, 2118, 2261-62.

50. Article 124 – Maiming

50. Article 124—Maiming

a. *Text.*

"Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—"

(1) "seriously disfigures his person by any mutilation thereof;"

(2) "destroys or disables any member or organ of his body; or"

(3) "seriously diminishes his physical vigor by the injury of any member or organ; is guilty of maiming and shall be punished as a court-martial may direct."

b. *Elements.*

(1) Simple Maiming.

(a) That the accused inflicted certain injury upon a certain person;

(b) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

(c) That the accused inflicted this injury with an intent to cause some injury to a person.

(2) Maiming with the intent to disfigure or disable

(a) That the accused inflicted certain injury upon a certain person;

(b) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

(c) That the accused inflicted this injury with an intent to disfigure or disable some person.

c. *Explanation.*

(1) *Nature of offense.* It is maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

(2) *Means of inflicting injury.* To prove the offense it is not necessary to prove the specific means by which the injury was inflicted. However, such evidence may be

considered on the question of intent and whether the intent was to injure generally or to disable or disfigure.

(3) *Intent.* Simple maiming requires a specific intent to injure generally, but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article. Maiming with an intent to disfigure or disable is a more aggravated form of the offense and is more serious than simple maiming. Maiming with intent to disfigure or disable requires a specific intent to achieve the disabling or disfiguring injury that resulted. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the general intent to injure or the more aggravated intent to disfigure or disable.

(4) *Defenses.* If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. *See* R.C.M. 916.

d. *Lesser included offenses.*

(1) Simple Maiming.

(a) Article 128—assault; assault consummated by a battery
(b) Article 128 -assault with a dangerous weapon
(c) Article 128 — assault intentionally inflicting grievous bodily harm
(d) Article 80—attempts

(2) Maiming with an intent to disfigure or disable

(a) Article 124 – Simple Maiming
(b) Article 128—assault; assault consummated by a battery
(c) Article 128 -assault with a dangerous weapon
(d) Article 128 — assault intentionally inflicting grievous bodily harm
(e) Article 80—attempts

e . *Maximum Punishment.*

(1) Simple Maiming. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years. *If committed on a child under 16 years of age.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(23) Maiming with the intent to disable or disfigure. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specification.*

(1) Simple Maiming.

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about ____ 200_ , maim_____ [a child under the age of 16 years] (by crushing his/her foot with a sledge hammer) (_____).

(2) Maiming with the intent to disfigure or disable.

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about ____ 200_ , with the intent to (disable or disfigure), maim_____ (by crushing his/her foot with a sledge hammer)

54. Article 128 – Assault

e. *Maximum punishment.*

(1) *Simple assault.*

(a) *Generally.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) *When committed with an unloaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *Assault consummated by a battery.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Assault upon a commissioned officer of the armed forces of the United States or a friendly foreign power, not in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(4) *Assault upon a warrant officer, not in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(5) A*ssault upon a noncommissioned or petty officer, not in the execution of office.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(6) *Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(7) *Assault consummated by a battery upon a child under 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(8) *Assault with a dangerous weapon or other means of force to produce death or grievous bodily harm.*

(a) *When committed with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(b) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(9) *Assault in which grievous bodily harm is intentionally inflicted.*

(a) *When the injury is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(b) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

11-1 Verbatim Record only for Sentences Exceeding One Year or a Punitive Discharge

Concise Summary of Proposed Change: Eliminate the requirement for verbatim records of trial that do not require review pursuant to Article 66(b) UCMJ [death, punitive discharge, confinement for one year or more]. Require a verbatim record of trial only when the adjudged sentence exceeds one year **or** a punitive discharge. The proposal would require amendment of Articles 19 and 54, UCMJ, as well as associated Rules for Courts-Martial, e.g. RCM 1103(b)(2), and regulatory [AR 27-10] guidance.

Rationale: Verbatim records are currently required in cases that do not merit an automatic appeal/review by the Army Court of Criminal Appeals [cases where confinement and/or forfeitures exceed 6 but not 12 months and where no punitive discharge is adjudged].

Pro:

- Practically speaking, a verbatim record is needed only for a true appellate review. The proposal would result in an average of at least 20 fewer verbatim records per year, and perhaps more (accurate data not obtainable due to ACMIS search limitations.

- The sentencing agency's decision that misdemeanor confinement and no discharge are appropriate does not warrant the commitment of resources a verbatim record requires.

Con:

- Congress is unlikely to approve this change, unless part of a package. When it amended Article 19 to increase the maximum punishment at a special court-martial to include twelve months confinement and forfeitures for twelve months, specific language was added to require a verbatim record whenever confinement in excess of six months, or forfeiture of pay for more than six months, is adjudged.

- Prior to this amendment, a verbatim record was required in a special court-martial only when a bad-conduct discharge was adjudged.

Impact on other proposals for change:

Other studies, articles, or information considered:

819. Art 19. Jurisdiction of special courts-martial

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, or forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year. A bad-conduct discharge, confinement for ~~more than six months~~ one year, or forfeiture of pay ~~for more than six months~~ for one year may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

RCM 1103

Amend: RCM 1103(b)(2)(B) by deleting subparagraphs(i)and (ii) and substituting therefor:

Any part of the approved sentence, suspended or unsuspended, includes a bad-conduct discharge, confinement for one year, or forfeiture of pay for one year.

11-2 No Record of Trial Required When All Charges are Dismissed After Arraignment

Concise Summary of Proposed Change: Eliminate the requirement for any record of trial when a court-martial is terminated by: reason of an acquittal of all charges and specifications; withdrawal, dismissal or declaration of a mistrial prior to findings; a finding of not guilty due to lack of mental responsibility; or approval of an administrative discharge in lieu of court-martial after findings.

Rationale:
a. "Adjudged" vs. "approved" sentence change. RCM 1103(b)(2)(B) requires a verbatim record when the adjudged sentence exceeds six months confinement, forfeiture of pay greater than 2/3 pay per month, any forfeiture of pay for more than six months, or includes a punitive discharge . By changing the word "adjudged" to "approved" in this Rule, a verbatim transcript is no longer required if the CA agrees to approve no sentence exceeding this limit. By analogy, when problems with the recording equipment preclude the preparation of a verbatim record, a summarized record may be prepared and the CA is limited to a sentence that would not require a verbatim record.

b. Administrative separations after arraignment. A court-martial order [prom order] publishes the results of the trial, and restores to the soldier all rights and privileges of which he or she has been deprived. The proposal is to require the same type of record in this case as is required in an acquittal, which is simply evidence of jurisdiction over the accused and the offenses.

Pro:

- Would reduce the number of verbatim records produced where there will be no review of any kind.
- Will reduce the number of verbatim records required only by the sentence to forfeitures; accused will still receive a summarized record and will have sentence reduced.
- Admin discharge after findings sets aside the conviction—no need for a "record."

Con:

- Summarized records contain a wealth of information to which an accused might be entitled under FOIA; an acquittal-type record would not contain this information.
- Might be misused to prevent preparation of a record that would disclose errors at trial

Impact on other proposals for change: None

Other studies, articles, or information considered: None

Rule 1103. Preparation of record of trial

RCM 1103(b)(2)B)(i) is amended to read:

(i) Any part of the sentence ~~adjudged~~ approved exceeds six months confinement, forfeiture of pay greater than two thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial; or

RCM 1103(e) is amended to read:

(e) *Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of mental responsibility; termination prior to findings*. Notwithstanding subsections (b), (c), and (d) of this rule, if proceedings resulted in an acquittal of all charges and specifications, in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if the proceedings were terminated by withdrawal, mistrial, or dismissal before findings, or if the proceedings terminated after findings by approval of an administrative discharge in lieu of court-martial, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet). The convening authority or higher authority may prescribe additional requirements.

AR 27-10, Military Justice, Section VI, Records of Trial, para 5-40e, is amended to read:

If the proceedings have resulted in an acquittal of all charges and specifications, or in termination before findings, or in the approval of a discharge in lieu of court-martial after findings, the record of trial will be prepared under R.C.M. 1103(e), and para 5-40g below. ~~In addition, the record will include a summary of the final proceedings up to the disposition of the case and all documentary exhibits and allied papers,~~ DD form 491 may be modified and used as a binder for the record of trial.

The following new paragraph is added as 5-40g:

g. When the proceedings are terminated by withdrawal for reasons other than to affect an administrative discharge in lieu of court-martial, and the charges are subsequently re-referred to a court-martial, the summarized record of the terminated proceedings must reflect all proceedings after assembly of the court. The summarized record of the terminated proceedings will be appended to any subsequent court-martial involving the same offenses, either as an appellate exhibit or as allied papers.

Para 5-46 is amended to read:

a. On completion of review and any required supplemental action, records of trial for SCMs and SPCMs that do not involve approved BCDs or confinement of ~~more than 180 days~~ one year will be filed under AR 25-400-2 (file numbers 27-10a and 27-10c respectively). Office of the Staff Judge Advocate of the GCMCA will dispose of them 10 years after final action by the supervisory authority. The proper records center for retirement of these files is the National Personnel Records Center, 9700 Page Boulevard, St. Louis, MO 63132.

b. On completion of any required review and supplemental action, original records of trial of GCMs, SPCMs with approved BCDs or confinement for ~~more than 180 days~~ one year or more ~~s~~suspended or unsuspended, and SPCMs bearing a U.S. Army Judiciary docket number, will be sent for filing to the Office of the Clerk of Court (JALS-CC), U.S. Army Legal Services Agency, Suite 1200, 901 N. Stuart Street, Arlington, VA 22203. The distribution of the record of trial in SCM proceedings is discussed in subparagraph 12-7e of this regulation.

11-3 Electronic Records of Trial

Concise Summary of Proposed Change: Require electronic records of trial.

Rationale: The potential savings electronic records will bring—just in postage and storage—are enormous. No UCMJ provisions require amendment. Rules of Courts-Martial do require amendment:

-RCM 1103(a) must be supplemented with language that allows a record of trial to be written or digital; explains authentication with a digital signature; and permits service of a digital copy on counsel.

-RCM 1111 should be amended to clarify that digital records satisfy this rule.

-RCM 1103(g) needs to specify the number of copies, if any, that will be made, and whether the accused will be furnished a written or digital copy of the court-martial record of trial.

Impact on other proposals:

Unknown

Other studies considered:

Report of the Ad Hoc Committee on the Use of Technology in the Military Justice System, 18 June 1999.

Rule 11-3. Electronic records of trial

Summary of Proposed Change: Permit the use of electronic records of trial

Rationale: Efficient use of technology.

Rule 1103. Preparation of record of trial.

Amend RCM 1103(a) by adding the following sentence:

A record of trial may be either written or digital. A digital record of trial must be authenticated with the military judge's digital signature. Service of an authenticated digital copy of the record of trial with a means to review the record of trial satisfies the requirement of service under RCM 1105(c) and 1305 (d).

Amend RCM 1103(b)(2)(B) is to read:

Verbatim transcript required. Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim written or digital transcript of all sessions except sessions closed for deliberations and voting when:

Amend RCM 1103(g)(1)(A) to read:

In general. In general and special courts-martial which require a verbatim transcript under subsections (b) or (c) of this rule and are subject to a review by a Court of Criminal Appeals under Article 66, the trial counsel shall cause to be prepared an original and four copies of ~~the~~ any written record of trial and one copy of any digital record of trial. In all other general and special courts-martial the trial counsel shall cause to be prepared an original and one copy of ~~the~~ any written record of trial and one copy of any digital record of trial

Amend RCM 1103(j)(2) to read:

Preparation of ~~written~~ record. When the court-martial, or any part of it, is recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, a ~~written~~ transcript or summary as required in subsection (b)(2)(A), (b)(2)(B), (b)(2)(C), or (c) of this rule, as appropriate, shall be prepared in accordance with this rule and R.C.M. 1104 before the record is forwarded under R.C.M. 1104(e), unless military exigencies prevent transcription.

Rule 1111. Disposition of the record of trial after action.

Amend RCM 1111(a)(1) by adding the following sentence:

Forwarding of an authenticated digital copy of the record of trial satisfies the requirements under this rule.

Rule 1305. Record of trial

Amend RCM 1305(b) to read:

Contents. The summary court-martial shall prepare ~~an original and at least two copies of the~~ a record of trial, which shall include:

12-1 Revise Post-Trial Processing

Concise Summary of Proposed Change: Revamp post-trial processing requirements to make execution of sentences automatic, unless the CA grants clemency. Eliminates the SJAR requirement. Gives military judge supervisory role post-trial until record of trial received by appellate review agency or the RCM 1102 review is completed.

Rationale:

Pro:

- The vast number of post-trial processing issues occupying the appellate courts' resources should alone justify reform of this process, regardless of the statutory, MCM and regulatory changes involved. The process needs to be made less complex yet still accord the appellant his due process. Moreover, the current post-trial process is a remnant of the pre-1983 Military Justice Act philosophy of having the convening authority act as an appellate authority. With the advent of the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces, the convening authority's role now involves almost purely clemency issues, not legal issues. The process should be revised to reflect this reality.

- Most post-trial processing issues stem from errors in the Staff Judge Advocate's Post-Trial Recommendation (SJAR). This proposal may solve some of that problem.

- Records of trial are not, in general, truly needed for submission of clemency matters. Defense counsel and accused can make copies of exhibits and can have witnesses summarize their own testimony in affidavits.

- Commanders rarely view records in the course of taking action or deciding clemency.

Con:

- Submission of clemency matters prior to the preparation of the ROT would interfere with the ability of the defense counsel to include favorable excerpts from the ROT to the convening authority as part of the clemency request.

- There would be less incentive for the Staff Judge Advocate's office to produce the record of trial – *Collazo* would still exist. However, *Chisolm* and this change would give military judges the authority to take appropriate action for unreasonable post-trial delays.

Impact on other proposals for change:

Other studies, articles or information considered:

1. Transforming Military Justice: Timely Post-Trial Processing [Court Reporter Report] (COL Harvey).
2. Transforming Military Justice: Digitizing the Post-Trial Process [eJustice Memo] (COL Harvey).

Neither of these studies suggest changes to the post-trial process itself, but rather, recommend increase and better utilization of court reporter assets and digitizing the existing post-trial process to make it more efficient.

3. Report of the Process Action Team on Improving Military Justice Legal Processes, 15 March 1996 [Navy Report], "Elimination of Convening Authority Actions and Legal Officer/SJA Recommendations" and "Combining Convening Authority's Action and Promulgating Order into One Document."
4. JSC proposal, 1999, unknown service (looks like a Navy submission) and JSC proposal, Marine Corps, undated (Navy/Marine Report). This submission proposes amending Article 60 to provide for:

- submission of clemency petition to convening authority within 7 days after sentence is announced
- providing appellant a copy of the record of trial only upon timely (within 10 days after sentence is announced) request for use in preparing clemency submission; if record of trial provided, appellant must submit clemency matters within ten days of its receipt
- extension of time to submit clemency matters upon a showing of good cause
- SJAR, the contents of which "shall include such matters as he [the staff judge advocate] deems are appropriate to assist the convening authority," is provided to convening authority before taking action
- convening authority action taken on the sentence (action on findings is optional) following authentication.

Art. 57. Effective date of sentences.

(a) The sentence of a court-martial, as modified by a pretrial agreement, if any, not extending to death or a punitive discharge shall become effective on the date adjudged.

(b) The convening authority may, in his or her sole discretion, defer the running of any sentence to forfeitures, reduction in grade, or any punishment involving deprivation of liberty, for a period not to exceed 60 days from the date the sentence was adjudged. Periods of deferment shall be excluded in computing the time a sentence shall run.

(c) Adjudged forfeitures of pay or pay and allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence is adjudged.

(d) All other sentences of courts-martial are effective on the date ordered executed.

(e) In this subsection the term “convening authority” means the officer who convened the court-martial in question, an officer temporarily replacing the officer who convened the court-martial, or his or her successor in command. Under the regulations of the Secretary concerned, a case may be transferred post-trial to another convening authority, who shall have the authority of the original convening authority under subsection (b), above.

ARTICLE 60, UCMJ

POST-TRIAL ACTIONS

(a) The findings and sentence of a court-martial, including any recommendation for suspension or other clemency, shall be reported promptly to the convening authority. Approval of the findings and sentence by the convening authority is not required, but the convening authority may grant clemency as authorized in this subsection.

(b) Absent clemency action by the convening authority as provided in subsection (c), below, the findings and sentence adjudged by the court-martial, as modified by a pretrial agreement, if any, is automatically executed 60 days after sentence is announced, except that any sentence extending to a punitive discharge or death may be ordered executed only after completion of appellate review pursuant to section __ of this chapter.

(c) The accused may submit a request for clemency to the convening authority within 30 days of the date sentence was adjudged. Clemency is a matter of command prerogative within the sole discretion of the convening authority. The convening authority may, but is not required to, refer any request for clemency to his or her Staff Judge Advocate for advice. The convening authority may grant the clemency request in whole or in part or take no action on the request, in which case the sentence adjudged or modified in accordance with a pretrial agreement will be automatically executed as provided in subsection (b), above. Clemency powers include the power to disapprove,

commute, or suspend the sentence in whole or in part, as well as the power to disapprove the sentence in whole or in part. Any disapproval of the findings does not require a review for or finding of legal error.

(d) In extraordinary circumstances, the convening authority may stay execution of the sentence of a court-martial for an additional 30 days.

(e) A copy of the record of trial shall be provided to the accused after authentication, but it need not be provided prior to submission of any clemency request.

(f) Subject to regulations of the Secretary concerned, clemency action in subsection (c) above, may be taken by the officer who convened the court-martial, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction over the accused.

(g) Proceedings in revision or post-trial sessions may be ordered by the military judge at any time until the record of the original proceedings has been received by the Judge Advocate General, or until completion of any review under Art. 64 of this chapter. Upon good cause shown, such proceedings may be ordered to correct an apparent error or omission in the record, or if the record shows an improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. Such proceedings may also be ordered in the case of post-trial issues involving violations of constitutional or statutory rights of the accused. In no case, however, may a proceeding in revision–

(1) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(2) 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; or

(3) increase the severity of some article of the sentence unless the sentence prescribed for the offense is mandatory.

(h) A rehearing may be ordered by the military judge upon good cause shown. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings, but the military judge may enter a finding of not guilty as to any specification for which the evidence is insufficient as a matter of law or fact. A rehearing as to the sentence may be ordered by the military judge only upon a showing that the original sentencing proceedings were so constitutionally or procedurally defective as to materially prejudice the substantial rights of the accused, or when a finding of the court-martial has been set aside by action of the military judge.

(i) Any post-trial session conducted under this subsection prior to 60 days after sentence was adjudged will extend the time periods under (b) and (c) of this subsection

for 60 and 30 days, respectively, from the date the post-trial session adjourns. A post-trial session conducted under this subsection after execution of sentence may modify a sentence automatically executed under this rule, but it will not give rise to an additional period during which an accused may request clemency under subsection (c).

Art. 64 Review by a judge advocate.

(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether–

(A) the court had jurisdiction over the accused and the offense;

(B) the charge and specification stated an offense; and

(C) the sentence was within the limits prescribed as a matter of law.

(2) A response to ~~each~~ any allegation of error made in writing by the accused.

(3) If the case is sent for action under subsection (b) a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent ~~for action~~ to the ~~person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person's successor in command)~~ the military judge who presided over the trial or another military judge detailed by competent authority (or the summary court-martial officer in the case of a summary court-martial) if–

(1) the judge advocate who reviewed the case recommends corrective action; or

~~(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or~~

~~(3)~~ such action is otherwise required by regulations of the Secretary concerned.

(c)~~(1)~~ The person to whom the record of trial and related documents are sent under subsection (b) may

(~~A) disapprove or approve the findings or sentence, in whole or in part;~~

~~(B) remit, commute, or suspend the sentence in whole or in part;~~

~~(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or~~ take the corrective action recommended as a matter of law by the judge advocate reviewing the case or

~~(D) dismiss the charges.~~

~~(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.~~

~~(3) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate,~~ shall forward the record of trial and a statement of the reasons for refusal to take the action recommended to the Judge Advocate General for review under section 869(b) of this title (article 69(b)).

Art. 866. Review by a Court of Criminal Appeals

[no changes except as noted below]

(c) In a case referred to it, the Court of Criminal Appeals may ~~act only with respect to the findings and sentence as approved by the convening authority. It may~~ affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it 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.

(_) Upon application of a person held in contempt under section 848 of this chapter, the Court of Criminal Appeals may consider whether the military judge abused his discretion in holding that individual in contempt. In considering the record, it is bound by the factual findings of the military judge unless they are clearly erroneous.

Art. 69. Review in the office of the Judge Advocate General

[no changes except as noted below]

(f) In cases referred to the Judge Advocate General pursuant to section 864(c) of this title (article 64(c)), the Judge Advocate General may take any action which he is otherwise authorized to take under this section.

12-2 Final Orders [deferred until completion of survey/manpower estimates]

Concise Summary of Proposal: Eliminate the requirement for final orders (FO); or make promulgating orders self executing; or have Clerk of Court issue final orders for service members on appellate leave or parole.

Pro:

- Efficiency. Clerk can complete a FO in 30 minutes; takes two hours to complete a FO at Sill, Knox, Leavenworth.
- Saves mail costs. 80% of FO are issued after accused on appellate leave, and would be issued by Clerk.
- By requiring one last "look" at accused's viability for continued military service prior to approving appellate leave, we retain most vestiges of our paternalistic, convening authority-centered justice system.
- Saves 1760 soldier work hours annually [1100 FO per year x 80% handled by Clerk of Court x 2 hours per FO].

Con:

- Requires more extensive revision of MCM, e.g., R.C.M. 1114, [but not UCMJ].
- Requires more coordination with finance and personnel; need to implement electronic transmission capability.
- Absence of any final order, or use of self-executing prom orders, will likely delay issuance of DD 214 and removal of former SM from rolls, unless DA centralizes process.

Impact on other proposals for change: None. Needs coordination with ejustice developers.

12-2 Clerk of Court promulgates final orders

Rule for Court-Martial 1113

RCM 1113(c) is amended to read:

(c) *Punishments which the convening authority may not order executed in the initial action.*

(1) *Dishonorable or a bad-conduct discharge*. A dishonorable or a bad-conduct discharge may be ordered executed only by:

(A) The officer who reviews the case under R.C.M. 1112(f), as part of the action approving the sentence, except when that action must be forwarded under R.C.M. 1112(g)(1); or

(B) The officer then exercising general court-martial jurisdiction over an accused who is in confinement; or

(C) The Secretary concerned or such official as the Secretary may designate for an accused on appellate leave or parole.

A dishonorable or bad-conduct discharge may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. Prior to placing a servicemember on appellate leave or parole, or ordering a discharge executed if the servicemember remains confined, the officer exercising general court-martial jurisdiction over the servicemember shall consider the recommendation of that officer's staff judge advocate, addressing whether retention of the servicemember would be in the best interest of the service.

Rule for Court-Martial 1114

RCM 1114(b)(2)(B) is amended to read:

(B) *Other cases*. In cases other than those in subsection (b)(2)(A) of this rule, the final action may be promulgated by an appropriate convening authority for those accused who remain in confinement, or by the Secretary concerned, or such official as the Secretary may designate for all other individuals.

17-2 Changes to the Commander's Report of Disciplinary Action Taken

Concise Summary of Proposed Change: Make O5 commanders responsible for report on DA 4833. Revise the reporting of DA Form 4833 Commander's Report of Disciplinary Actions to make the reporting of the final disposition in cases of felony misconduct investigated by CID command the responsibility of O5 commanders instead of the unit commander.

Rationale: The current system is failing to properly report the ultimate disposition in over 30% of felony cases. The likely cause of this shortcoming is the number of other responsibilities faced by our unit commanders, the lack of training and the lack of understanding of the "Big Army's" interest in accurately linking investigation outcomes to dispositions taken for DIBRS, and the low significance placed on reporting on an action already completed often months prior.

Impact on other proposals for change: None.

Other studies, articles, or information considered: A recent series of articles in the Denver Post, "Betrayal in the Ranks", highlighted the need for accurate reporting of the ultimate disposition of felony investigations.

Proposed Changes:

Adds provisions for reporting and investigating domestic violence and sexual assault incidents when a victim requests command assistance, reports the incident to military or civilian law enforcement agencies, or to a rape crisis center (para 1-1, 2-12, 4-21, and 4-XX)

Adds commander's responsibility to support the Family Advocacy Program (Chapter X-XX)

Adds commander's responsibility to support traffic regulations and laws (para 4-XX)

Adds chapter X implementing requirement for battalion commander's report on action taken on military police and USACIDC reports

Adds reporting requirements for the Department of the Army and Department of Defense Domestic Violence Database (X-XX)

Adds Army Regulation 190-45, Law Enforcement Reporting, as a required reference regulation (Chapter 4)

Adds Army Regulation 601-18, The Family Advocacy Program (para 4-XX)

Adds procedure for reporting fraternization (para X-XX)

Revise para 1-1. ADD: It implements commander's reporting requirements outlined in Department of Defense Directive 7730.47 for the Defense Incident Based Reporting System (DIBRS) which include reporting criminal incidents to the installation provost marshal office (PMO) and the U.S. Army Criminal Investigation Command (USACIDC).

Revise para 2-12. ADD: Additionally, the successor will ensure that personnel actions, to include reports referred by the installation PMO and USACIDC are properly reported to the PMO and USACIDC as well as the installation staff judge advocate.

Revise para 4-4b. REVISE last sentence to read: If the soldier is turned over to civilian police, the above information will be sent to the civilian police and installation PMO.

Revise current para 4-21 to read as follows:

4-21. Bias.
Racial, ethic/nation, religious, and sexual orientation bias will not be tolerated. Such activity undermines good order and discipline in the Army. When an incident is committed against a person or property, and the misconduct is motivated by the offender's bias against a race, religion, ethnic/national origin, or sexual orientation, the installation PMO must be immediately informed to support a timely law enforcement inquiry to substantiate that the incident is criminal and the result of bias activity.

ADD A NEW PARAGRAPH

4-XX Reducing and addressing domestic violence and sexual assault incidents
Commanders at all levels must be familiar with the provisions of AR 608-8 and family advocacy programs that are designed to identify and treat individuals and their families who may potentially become involved in domestic incidents. When an incident occurs, appropriate reports must be immediately made to the agencies identified in ARs 608-8, 190-45, and 195-2.

ADD A NEW PARAGRAPH

4-XX. Enforcement of traffic regulations and laws
Commander's must be familiar with the provisions of AR 190-5 to ensure that personnel are operating government and privately owned motor vehicles as prescribed by installation regulations, state, and host nation laws. Reports of violations made to military commanders and the commander must address civilian supervisors by the installation PMO and civilian law enforcement agencies with the soldier, civilian employee, or contractor.

Revise the number sequence for the remaining paragraphs of Chapter 4

ADD A NEW CHAPTER TITLED: Commander's Report of Disciplinary Action Taken

X-XX. Criminal Incident Reporting
a. Commanders at all levels are responsible for reporting alleged criminal incidents to the installation PMOs and USACIDC for appropriate inquiry and investigation.

b. When the PMO and USACIDC refer a completed report to the appropriate commander, the commander may refer the case to staff agencies, dispose of the case pursuant to administrative or nonjudicial authority; or other options granted in the Manual for Courts-Martial or prefer court-martial charges, or forward the case to an appropriate convening authority for disposition. Commanders should consult with the supporting staff judge advocate when considering action to be taken against a soldier. Commanders must notify all persons listed in the title or subject block of a USACIDC report of investigation or military police report, who have no action taken against them, that their name will remain in the title or subject block of the report and that the report will be indexed, and therefore retrievable by their name. Individuals will also be informed of the purposes, for which the reports are used (e.g., other criminal investigations, security clearances, other purposes, as authorized by the Privacy Act and AR 340-21) and the fact that such use may have an impact upon their military or civilian careers. Individuals will be informed also that the removal of their name from the title block or other amendment of the report may be accomplished only by submitting a written report to the Director, U.S. Army Crime Records Center, 6010 6th Street Fort Belvoir, Va.

c. The first Lieutenant Colonel in the chain of command is responsible and accountable for completing DA Form 4833 with support documentation (copies of Article 15's, court-martial orders, reprimands, etc) for all USACIDC investigations. Company, troop, and battery level commanders are responsible and accountable for completing DA Form 4833 with supporting documentation in all cases investigated by MPI, civilian detectives employed by the Department of the Army, and the PMO. Accurate and complete disposition reports are required to meet installation, command, HQDA, DOD, and federal statutory reporting requirements. The data is used to identify trends, establish command programs in law enforcement, community, family, legal, religious services, and local command programs to ensure that resources are made available to support commanders who must address issues of soldier and family member indiscipline.

d. Installation and Command Staff Judge Advocates and Provost Marshals will assist supervisory Special and General Court-Martial Convening Authorities in establishing appropriate local procedures to ensure that DA Form 4833s are returned in a timely fashion to the provost marshal or USACIDC.

Add X-XX. Support to the Domestic Violence Database

a. Each domestic violence incident must be reported to the installation PMO. Commanders and noncommissioned officers in leadership positions are significant contributors to timely reporting and supporting an Army-wide solution to eliminate domestic violence within Army families. AR 608-18 provides guidance on responses to spouse and child abuse and the role of commander in reporting incidents and command support.

b. Reporting requirements include the number of incidents that involve evidence determined sufficient for supporting disciplinary action, and a description of the substantiated allegation and the action taken by command authorities in the incident. The report will include a copy of the action taken.

c. Domestic violence reports are required when the use, attempted use, or threatened use of force of violence constitutes an offender under the United States Code or the Uniform Code of Military justice against person of the opposite sex, or the violation of a lawful order issued for the protection of person of the opposite sex who is:

(1) A current or former spouse

(2) A person with whom the abuser shares a child in common

(3) A current or former intimate partner with whom the abuser shares or has shared a domicile

X-XX. Fraternization Offense

Commanders must report offenses established in Articles 133 and 134 of the UCMJ. Fraternization consists of entering into an unprofessional relationship or any criminal offense based on violation of a punitive regulation or a lawful general order, in violation of Article 92 involving fraternization or entering into an unprofessional relationship. Reports on fraternization and other incidents that are investigated by the commander

must be reported to the installation staff judge advocate to determine if the offense is criminal and warrants involvement of law enforcement personnel.

ADD TO:

Appendix A
References

Section I
Required Publications

AR 190-5

Motor Vehicle Traffic Supervision (cited in para 4-XX)

AR 190-45
Law Enforcement Reporting (cited in para 4-XX)

AR 195-1

Army Criminal Investigation Program (cited in para 4-XX)

AR 195-2

Criminal Investigation Activities (cited in para 4-XX)

AR 608-18

The Family Advocacy Program (cited in para 4-XX and X-XX)