

1-1 Jurisdiction over Reservists not on IDT or AD

Concise Statement of Proposal: Article 2(d)(A) and (B) establish jurisdiction over reservists for offenses committed while on AD or IDT. The proposal would add (C) to extend jurisdiction over those offenses committed by reservists while acting in an “official capacity.” This would reach such offenses as filing false travel claims, making false official statements, such as on documents submitted for retirement points, or statements made while being questioned during official investigations.

Rationale: The class of individuals whose conduct would be reached by this statute is very small, and the vast majority of those who commit “official misconduct” while not on IDT or AD can be prosecuted for such offenses in state or federal court. A false official statement or false claim could be prosecuted under 18 USC 1001, for example. “Official capacity” is a somewhat amorphous concept reminiscent of the old “service connection” doctrine. Those who litigated cases under that doctrine recommend against resurrecting it. The AF Court has held that a reserve officer who files a fraudulent claim is subject to military jurisdiction, regardless of his military status at the time the claim is filed.

Impact on other proposals for change: None noted.

Other studies, articles, or information considered: Harder, TAL Apr/May 2003, *Moving Towards the Apex: Recent Developments in Military Jurisdiction*; *United States v. Morse*, 2000 CCA Lexis 233, (A.F.Ct.Crim.App. 2000).

1-2 Jurisdiction over Retirees

Concise Statement of Proposal: Article 2(a)(4)-(6) establish jurisdiction over military retirees, who may be tried in a retired status, or ordered to active duty for purposes of a court-martial. The proposal would add a “service connection” requirement to any offense for which a retiree is tried by court-martial.

Rationale: Few retirees are ever prosecuted for offenses committed in a retired status. (Those offenses that occurred prior to retirement would presumably have a sufficient service connection to warrant prosecution under this proposal). While a scholarly article (see below) that traces the history of retiree courts-martial concludes that jurisdiction over retirees for such offenses as contemptuous speech or disrespect is too broad and may be constitutionally infirm, there is no evidence that retirees have been subject to courts-martial wantonly or irrationally. AR 27-10, para. 5-2b(3) requires Secretarial approval to recall retirees to active duty for court-martial, and approval of OTJAG Criminal Law Division before referral of any charges. Addition of a “service connection” requirement might not prohibit court-martial for Art. 88 or Art. 90 violations, as a service connection may be more easily established for those offenses than for malum in se offenses.

Impact on other proposals for change: None noted

Other studies, articles, or information considered: Ives and Davidson, *Court-Martial Jurisdiction over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up*, 175 Mil.L.Rev. 1 (Mar. 2003).

2-1 Garrison Commanders as GCMCA's

Concise Statement of Proposal: Amend Article 22, UCMJ, to specifically designate garrison commanders as GCMCA's.

Rationale:

- ✓ Transformation of Installation Management (TIM) envisions the civilianization of garrison functions and the downsizing of garrison staffs
 - Proposed Standard Garrison Organization (SGO) calls for only 11 military authorizations on the TDA for a medium-large garrison
 - Possibility exists that the position of Garrison Commander could be civilianized at installations that are not power projection platforms
- ✓ Military paralegal and court reporter positions on Garrison TDAs will become highly vulnerable to civilianization
- ✓ Opposition can be anticipated from senior commanders of tenant units to being placed under the GCMCA of a Garrison Commander
- ✓ If necessary, a Garrison Commander can be designated as a GCMCA by SECARMY pursuant to Article 22(a)(8)

Impact on other proposals for change: No direct impact, but the support of Garrison Commanders/Staffs will continue to be important in ongoing efforts to upgrade courtroom facilities. Recommend against consolidation of court reporter personnel in Garrison TDA offices because of the potential for civilianization and/or personnel decrements.

Other studies, articles, or information considered: Corps Functional Review (2003); O&O Plan for the Installation Management Agency.

2-2 GCMCA/SPCMCA in Joint Commands

Concise Statement of Proposal: Creates two new types of court-martial: the Joint General Court-Martial (JGCM) and the Joint Special Court-Martial (JSPCM) that would be convened exclusively in a joint environment.

- All service personnel would be subject to the CMCA of the joint commander while assigned in the joint AOR
- JGCM/JSPCM would select joint panels using Article 25 criteria; accused would have right to have at least 1/3 of the court members be from his/her service
- Accused would have right to request representation by defense counsel from his/her service
- Appellate jurisdiction would depend on the accused's branch of service

Rationale:

- ✓ Proposal is consistent with the transformational imperative of joint "interdependence" rather than mere joint "interoperability"
- ✓ Joint courts-martial, however, cannot precede greater service integration on a variety of other fronts – legal training, more uniform service policies and regulations, greater convergence of service cultures, etc.
- ✓ Joint legal elements are generally not staffed to support GCMCA responsibilities while service component legal elements have these embedded capabilities – trial counsel, court reporters, etc.
- ✓ Current service component administration of military justice is working effectively to promote good order and discipline while protecting the rights of service members
- ✓ Proposal will warrant consideration in the future as DoD transformation produces greater service integration

Impact on other proposals for change: None.

Other studies, articles, or information considered:

2-3 Unit of Action Convening Authority

Concise Statement of Proposal: Examine the designation of court-martial convening authority within the Future Force's Unit of Action (UA)

- UA will be commanded by a Colonel (O-6) and will be comparable to a Brigade in the Current Force
- New position of Deputy Commander will be filled by a Colonel (O-6)
- Projected design calls for two (2) Judge Advocates (O-4 & O-3) in the Brigade Operational Law Team (BOLT)

Rationale:

- ✓ Expectation is that UA's will deploy more frequently and operate more independently than Brigades in the Current Force
- ✓ UA will operate under a force pooling concept whereby they may not have an habitual relationship with the same higher echelon (unit of employment or UE) headquarters
- ✓ Assignment of two JA's to a BOLT carries with it the expectation that the UA commander will be able to exercise greater legal authority
- ✓ Further study is warranted to address the following types of issues:
 - Should UA commander be able to convene BCD SPCM?
 - Should UA commander be able to approve Chapter 10 discharges?
 - Should UA commander be able to direct filing of unfavorable information in a soldier's OMPF?
 - Should UA commander be able to delegate specific UCMJ responsibilities to the Deputy Commander?
 - Should court reporters be assigned to the UA?
 - Should UA's operate under a system of area jurisdiction?

Impact on other proposals for change: UE/UA lash-up; court reporter assignments.

Other studies, articles, or information considered: Unit of Action O&O; Corps Functional Review

3-1 Article 32 Right of Confrontation

Concise Statement of Proposal. Eliminate right of confrontation at Article 32 Investigation.

Rationale:

Pros.

(a) This proposal would arguably shorten the time required to conduct a pretrial investigation.

(b) This proposal would move the pretrial investigation more toward a civilian grand jury-type proceeding while still affording the accused greater rights than targets of grand jury investigations are afforded (right to counsel, to be present, to present evidence, to request witnesses, etc.)

Cons.

(a) The purpose of the article 32 investigation, a holdover from Article 70 of the Articles of War of 1920, is to ensure a full, fair, and impartial investigation to determine whether there is probable cause to believe an accused has committed an offense prior to referral of a charge to a general court-martial. It is one of several requirements imposed by the UCMJ to prevent the trial of baseless charges – see also, for example, the Article 34 pretrial advice. Eliminating the right of cross-examination would negatively effect that purpose – the determination of whether probable cause exists could be made based on the untested words of government witnesses; cross-examination of that witness, on the other hand, could undermine the credibility of both the witness and the government’s case such that the investigating officer reaches the opposite conclusion as to whether probable cause exists. As such, eliminating this right could result in needless referral of charges and decrease, rather than increase the efficiency of the military justice system.

(b) In addition, in some jurisdictions, the practice of the trial counsel is to simply have the government witness adopt his or her sworn statement, and forgo any further direct examination. This practice in conjunction with a denial of the right of cross-examination could effectively limit the investigating officer’s consideration of evidence to the investigative file – so why bother with it at all?

(c) I have not found any reported or anecdotal systemic problems or difficulties arising from the right of cross-examination at the article 32 investigation. In the absence of such difficulties, what problem does this proposal attempt to address?

(d) While this proposal would bring the pretrial investigation closer to a form of grand jury investigation, the pretrial investigation is not supposed to “look” like a grand jury investigation. Rather, the civilian counterpart that much more closely resembles the

Article 32 investigation is the federal preliminary hearing. Those preliminary hearings include the defendant's right to attend, be represented by counsel, and to cross-examine the government's witnesses, among others. See Fed. R. Crim. Pro 5.1(e). If the defendant is in custody, the preliminary hearing must take place within ten days of the defendant's initial appearance. *Id.* at Rule 5.1(c).

Impact on other proposals for change.

Proposals to limit or eliminate the presentencing proceeding and to mandate the sentence as agreed to in a pretrial agreement, and to drastically curtail the post-trial process in conjunction with this proposal to eliminate the right of confrontation at the pretrial investigation would fundamentally and negatively alter both the perception of fairness and the actual fairness of the military justice system. Article 46, UCMJ, mandates equal access to evidence; article 32 and the right of cross-examination is one means of ensuring equal access.

Other studies, articles, or information considered:

1. *Index and Legislative History, Uniform Code of Military Justice, UCMJ 50th Anniversary Edition*
2. Federal Rule of Criminal Procedure 5.

3-7 Increase Votes Needed to Convict

Concise Statement of Proposal: Increase the percentage of votes needed for a finding of guilty at a court-martial.

Rationale: In the military, an accused can be found guilty by a two-thirds vote of a panel. R.C.M. 921(c)(2)(B). By contrast, the civilian criminal system requires a unanimous verdict in order to convict the defendant of any charge. Fed.R.Crim.P, Rule 31.

Pro: Increasing the percentage of votes needed to convict of an accused would move the military justice system more in-line with the civilian criminal system, and, therefore, make it less susceptible to outside criticism.

Con: Increasing the percentage of votes needed to convict an accused would likely lead to an increase in the number of cases where an accused is found not guilty of one or more of the charges. Whether this is a pro or a con depends on your perspective.

The military does not have to move to a unanimous verdict system in order to improve its image in the public eye. One alternative is to require a 3/4 vote for a finding of guilty on any charge. Such an approach might strike a good balance between the status quo and the unanimous verdict.

However, proposing a change that is still below the rights given to civilians may serve only to highlight this disparity to the public.

Any change that is adopted should not create a voting system that could result in mistrials due to a hung jury. Such results would erode the finality that currently exists in courts-martial and could result in wasted resources if a retrial is necessary.

Impact on other proposals for change: None noted.

Other studies, articles, or information considered: Fed.R.Crim.P, Rule 31

3-8 Revamp Defense Witness Production

Concise Statement of Proposal: Eliminate the defense requirement to submit a witness list to the government for approval. Instead, have the defense submit their witness list directly to the military judge for approval.

Rationale:

Pro: This proposal would bring the process more in-line with the federal criminal system. Fed.R.Crim.P, Rule 17.

Con: Although at first blush this proposal seems to streamline the trial process by eliminating a required step, it actually could create a requirement for a judicial hearing where one may not have otherwise existed in a case.

The process for obtaining witnesses works most efficiently when the defense submits its witness list to the government and the government obtains the witnesses without dispute. Bypassing the government in this process eliminates the possibility that this process will be handled quickly and efficiently, without the need for litigation.

Even if the government does not to approve of the entire witness list, its partial approval will help focus any subsequent litigation to only those witnesses in dispute.

Impact on other proposals for change:

5) Revise and expand subpoena powers pretrial.

–Compulsory process for reasonably available witnesses; alternate means of presenting testimony otherwise

Other studies, articles, or information considered: Fed.R.Crim.P Rule 17;
Witness Production and the Right to Compulsory Process, Captain Richard H. Gasperini, The Army Lawyer, Sept. 1980, at 22.

4-1 Non-judicial Punishment (NJP)

Concise Statement of Proposal: Modify NJP to reduce punishments and eliminate or reduce lawyer involvement

Rationale: As long as NJP involves the potential deprivation of “property rights” - namely, rank reduction and/or forfeitures, the accused should be afforded an opportunity to receive legal advice. There is no reason to reduce NJP punishments to eliminate rank reduction and/or forfeitures because that option already exists in the form of summarized Article 15 punishment. One viable area of study might be allowing NCOs or PLT LDRs impose summarized Article 15s, with limited punishment and appeal rights to the commander.

Impact on other proposals for change:

Other studies, articles, or information considered:

Article 15 Survey Consolidated Results (Survey of approximately 1300 judge advocates and commanders on NJP demonstrates satisfaction with current NJP system).

4-2 Confinement Resulting From NJP

Concise Statement of Proposal: Permit short-term confinement for NJP

Rationale: While an excellent idea in theory, this would probably not work in practice because the reduced force structure and increased OPTEMPO make the manning of installation correctional custody units, a necessary prerequisite for short-term confinement, a very difficult task. A proposed change to AR 27-10 permits “correctional custody” as a form of “restriction” or “deprivation of liberty,” but adds that correctional custody “can be imposed only when a suitable correctional custody facility is available.” This proposal comes down to a question of resources to implement short-term confinement, more than the authority to do so.

Impact on other proposals for change:

Other studies, articles, or information considered:

4-3 Joint Non-Judicial Punishment (NJP) Rules

Concise Summary of Proposed Change: Develop joint rules for nonjudicial punishment and scrap service specific procedures.

Rationale:

Pro:

- Would simplify Article 15s for commanders of joint units.
- Would ensure a service members similar procedural due process.

Con:

- There is tremendous resistance among each service on the issue of standardizing NJP rules and procedures.
- The 2003 annual review of Military Justice considered the issue and rejected it.
- Service specific rules and procedures reflect the individual needs and traditions of the various services and how the Article 15 action is used by the services in making force management and promotion decisions.

Impact on other proposals for change or the military justice system: Could impact proposal 4-4 with respect to the filing of NJP.

Other studies, articles, or information considered: 2003 Annual Review.

Text of Proposed Change:

None.

4-4 Delink NJP from Court-Martial and Promotion Decisions

Concise Summary of Proposed Change: Lessen the adverse career impact of NJP by filing all NJP actions in the “restricted” fiche.

Rationale:

Pro:

- Non-judicial punishment was intended to deal with minor disciplinary infractions at a level not having the impact of a court-martial. This intent is defeated when an officer or noncommissioned officer’s career is significantly jeopardized by imposition of NJP.
- Different outcomes based on whims of local commander.
- In the Army there is no filing in the OMPF for E4 and below. For E5 and above filing, the imposing commander must file in the OMPF but can direct filing in the restricted fiche. This filing determination can also be appealed.
- The current deployed environment is replete with examples of experienced officers received NJP for minor misconduct. These officers will ultimately face separation based on the record of NJP in their personnel records. The end result will be a significant loss of officers with combat experience on active duty.

Con:

- Too difficult to de-link NJP as any reduction in rank will appear in the soldier’s records regardless of the filing of the Article 15.
- The authorized uses of the restricted fiche are so extensive as to make “restricted” filing meaningless for other than junior enlisted soldiers. See attached list of possible reasons for official access to restricted fiche.
- We trust commanders with other decisions affecting soldiers’ careers. The NJP filing decision rests with those who best know the soldier and his or her potential

Impact on other proposals for change or the military justice system: More difficult to do if proposal 4-3 with respect to the standardizing NJP procedures across the services is adopted, but we recommend rejection of 4-3.

Other studies, articles, or information considered: See attached information from LTC Schumake.

Use of the Restricted Fiche
(LTC Schumake)

-- Although records of NJP contained in the R-fiche may not generally be accessed by career boards (promotion/school etc.) or by career managers (R-fiche documents may not be filed in the CMIF (AR 600-8-104, paragraph 3-3b)), there are certain instances when boards and career managers can access these documents. Specifically, the R-fiche of the official military personnel file is accessed as follows:

- Post-board screening of officers selected for promotion to COL (AR 600-8-29, paragraph 1-15a)
- Post-board screening of officers selected for LTC and COL level command (DCS, G-1, SOP, paragraph 2-17a(4))
- When directed in the MOI to a promotion selection board or when requested by the officer concerned in written communication to the board (AR 600-8-29, paragraph 1-33b(2)(a))
- When requested by a promotion selection board president to protect the interests of the Army or the officer under consideration and approved by the Director, Military Personnel Policy (AR 600-8-104, paragraph 2-6e)
- CSM, SGM Academy and CSM/SGM retention boards, as a matter of course. (AR 600-8-104, paragraph 2-6d)
- Upon written request by the following activities: Army Board for the Correction of Military Records; DA Suitability Evaluation Board; Defense Investigative Service; DCS, G-1, Special Review Board; Litigation Division; Director of Counterintelligence and Security Countermeasures, Office of the Deputy Chief of Staff for Intelligence; Investigations Support Division, Office of Personnel Management; Commander, Enlistment Eligibility Activity (disciplinary data only); Federal Aviation Administration (to the extent FAA is delegated authority to perform pre-employment screening by OPM); and Department of Veterans' Affairs (line of duty investigations only, for persons separated or discharged from the Army)(AR 600-8-104, paragraph 2-6b)
- Requestors with a fully justified need for the information whose request is approved by CG, U.S. Army Human Resources Command; Commander, ARPERCEN; or Commander, ARNG Personnel Center (AR 600-8-104, paragraph 2-6c)
- Article 15s for use in court-martial proceedings (AR 600-8-104, paragraph 2-6c)

- Selective Early Retirement boards (Article 15 proceedings, DA Suitability Evaluation Board filings of unfavorable information, promotion list removal documents when officer is removed from list, letters of reprimand) (DA Memo 600-2, paragraph F-1g)
- Reduction in Force boards (Article 15 proceedings, DA Suitability Evaluation Board filings of unfavorable information, promotion list removal documents when officer is removed from list, letters of reprimand) (DA Memo 600-2, paragraph F-5b)
- Special Mission Unit command selection boards, as a matter of course (authority from board MOI and DA Memo 600-2, paragraph 7c)
- Summaries of information contained in restrictive fiche may be provided to general officer selection boards after referred to officer for comment and after Secretary or designee has determined that information is substantiated, relevant, and might reasonably and materially affect the board's deliberations (AR 600-8-29, paragraph 1-33b(2)(e)).

-- Nothing prevents a rater or senior rater from discussing the underlying misconduct that resulted in NJP in either officer or enlisted evaluation reports; however, neither officer nor enlisted evaluation reports may specifically mention that NJP was given when the NJP is filed in the R-fiche. (Officer, but *not* enlisted, evaluation reports may mention the NJP when it is filed on the P-fiche.)

Thus, as demonstrated above, items placed in the R-fiche may adversely affect a soldier's career notwithstanding the intent of the officer making the filing determination.

7-1 Modify MRE 1102 to Permit DoD GC, rather than the President, to approve FRE changes as part of MRE

Concise Summary of Proposed Change: Modify Military Rules of Evidence (MRE) 1102 to allow the DoD GC to approve or oppose application of amended Federal Rules of Evidence (FRE) (MRE) and decrease the waiting period for application of the FRE from 18 months to 6 months.

Rationale:

Pro:

- The proposed change would allow for thoughtful review of the amended FRE by OTJAG, Military Judges and the Joint Services Committee with sufficient time to obtain an action opposing application of the amended FRE to the MRE. There is no dispute that obtaining action from the DoD GC is an easier proposition than obtaining similar action from the President.
- The existing procedure already involves review by the DoD General Counsel.

Con:

- Most importantly, there is no authority for the President to delegate his ruling making authority to the DoD GC.
- Eliminates Presidential oversight of this particular means of amending the MRE.
- Current rule requires Presidential action within 18 months of the amendment to the FRE to prevent application of an amended FRE to the MRE. If the amended FRE is truly prejudicial to the administration of justice within the military, the lengthy process of obtaining Presidential action may allow questionable amendments to take effect.
- This issue was considered and rejected once by the JSC. See analysis to MRE 1102.

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

Other studies, articles, or information considered: RCM 1102 and analysis. Practical experience in obtaining Presidential action.

Text of the Proposed Change to MRE 1102:

Rule 1102. Amendments

Amendments to the federal Rules of Evidence shall apply to the Military Rules of Evidence 18 (6?) months after the effective date of such amendments, unless action to the contrary is taken by the General Counsel, Department of Defense.

7-2 Limit “Good Soldier” Evidence

Concise Statement of Proposal: Limit Good Character evidence to specified offenses.

Rationale: MRE 404(a)(1) limits character evidence of the accused to pertinent traits. This was a significant change from historical practice in the military and was even a big change from the 1969 Manual. The drafters were trying to limit the use of general good character evidence. Initially, the trial judiciary and the service courts tried to follow this rule by limiting evidence to purely military offenses, but the CMA, in a series of decisions, determined that while the rule limits evidence to pertinent traits, the court decides what pertinent means. Subsequent decisions by CMA/CAAF have reinforced that good military character is always pertinent.

Limitation of the presentation of character to reasonable amounts, thus keeping it non-cumulative, is still well within the sound discretion of the trial judge.

Impact on other proposals for change:

Other studies, articles, or information considered:

1. LTC Paul Capofari, U.S.Army, *Military Rule of Evidence 404 and Good Military Character*, 130 Mil.L.Rev. 171, Fall 1990.
2. Elizabeth Lutes Hillman, *The Good Soldier Defense: Character Evidence and Military Rules at Courts-Martial*, 108 Yale L.J. 879, January 1999.
3. *U.S. v. Clemons*, 16 M.J. 44 (CMA 1983).
4. *U.S. v. Benedict*, 27 M.J. 253 (CMA 1988) (“How convincing this [evidence] may be will vary with the facts.”).

8-3 Allow Alford Pleas

Concise Summary of Proposed Change: Permit an accused to enter an *Alford*-type plea as permitted by *North Carolina v. Alford*, 400 U.S. 25 (1970).

Rationale:

Pro:

- In cases where an accused believes (after consultation with qualified counsel) that she will likely be found guilty at trial notwithstanding her claims of innocence, current law requires her either to lie to receive the benefit of a pretrial agreement or to plead not guilty running risk of a higher sentence at trial. The *Alford* plea would permit the accused in such cases to take advantage of a pretrial agreement believed to be in her best interest while not admitting guilt. Therefore, the range of options is extended by acceptance of *Alford* pleas.
- In cases where an accused's inability to get through a *Care* inquiry is the only obstacle to a pretrial agreement, the *Alford* plea furthers the government's interest in obtaining a conviction while giving an accused a favorable sentence cap. The stumbling block of the accused's allocution is eliminated because the plea does not require the accused to admit guilt to each element of the charged offense.
- When an accused refuses to admit guilt but a factual basis exists to support a finding of guilt, an *Alford* plea saves a victim the trauma of having to testify. An *Alford* plea serves the interest of victims in not having to relive the events in cases involving sexual abuse, rape, or similar traumatic crimes.
- Permits those having legitimate memory issues (resulting from intoxication, head trauma, or similar causes) preventing them from affirmatively stating that they committed the offenses to take advantage of a favorable pretrial agreement.

Con:

- Although constitutionally permitted, *Alford* pleas strike against the normative value that the criminal system should convict only the guilty. It is wrong to convict persons who proclaim their innocence yet are willing to plead guilty (as distinguished from someone who proclaims her innocence yet is found guilty by a fact finder after a contested trial). The person in the best position to know whether she is *actually* guilty is the accused. If an accused insists on proclaiming her innocence, the government should not assist her in convicting her on a plea of guilty.

- *Alford* pleas undermine the value of accuracy of verdicts in the criminal justice system. On the one hand, there must be a basis in fact for an *Alford* plea or the judge must reject the plea; therefore, a plea of guilty seems accurate. Nonetheless, a guilty plea should be accepted *only* in the event the accused affirmatively states that she is guilty of the charged crime(s) or a lesser-included offense(s) and states on the record the reasons why she believes she is guilty of the offense(s). In the absence of such an allocution, the finding of the court-martial will always be subject to doubt as to its accuracy.
- *Alford* pleas permit an accused to dodge responsibility for her criminal misconduct because she need not state that she is guilty of the offense(s). The value of the accused's confession in open court is undermined by acceptance of a plea of "guilty" when the accused proclaims innocence. The interests of the community and the justice system, as well as the rights of victims are vindicated in cases where an accused pleads guilty, accepts responsibility for the criminal misconduct, and serves punishment. In cases where the accused pleads "guilty" but proclaims innocence, the community and the systems are deprived of the cathartic experience of knowing what happened. Further, the victim's sense of closure and acceptance is undermined. In such cases, the victim may still be labeled a liar by the accused and the justice system.
- Although acceptance of *Alford* pleas would put the military justice system on par with the federal system, acceptance of such pleas would subject the military justice system to further criticism. How can the proponents explain a service member's conviction on a guilty plea when she proclaims her innocence? To say that the military system is merely following what the federal and many state courts already do is not a sufficient explanation. The military justice system is subject to criticism largely because many believe that an accused is on a railroad (convening authority selection of members; defense counsel who wear the same uniform as the members, the military judge, the trial counsel and the convening authority; the large disparity in relative bargaining power between an accused and the government). Accepting a guilty plea from someone proclaiming innocence is inconsistent with the message that the military justice system is fair.

Impact on other proposals for change or the military justice system: Proposal 8-1 regarding the *Care* inquiry.

Other studies, articles, or information considered:

UCMJ, art. 45; R.C.M. 910; Fed. R. Crim Proc. 11; *McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969); *North Carolina v. Alford*, 400 U.S. 25 (1970); *United States v. Chancelor*, 36 C.M.R. 453 (C.M.A. 1966);

9-2 Modify Manual to Explain “Rights”

Concise Statement of Proposal: Modify MCM Part IV to explain what are “rights” and what is the case law interpretation of statute.

Rationale:

The proposal would require an expansion of the discussion section of Part IV of the MCM as well as periodic updates to reflect current developments in evolving case law. Such a task would be more appropriately reserved for articles published in the Army Lawyer and Military Law Review.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-3 Modify False Swearing and False Official Statement Offenses

Concise Statement of Proposal: Add materiality to false swearing and false official statement offenses and combine the offenses.

Rationale:

“Materiality” provision already added as part of the FY01 JSC review cycle.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-4 Add Necessity Defense

Concise Summary of Proposed Change: Add necessity as a special defense under R.C.M. 916, but limit its application to other than disobedience/absence offenses.

Rationale:

Pro:

- Eliminates conviction of accused who violate a law in order to prevent a greater harm; similar rationale to other justification defenses.
- Recognized—in varying degrees—under the common law, the Model Penal Code, and about half of civilian jurisdictions in the United States. Noted in dicta by military appellate courts.
- May reduce inconsistency caused by jury nullification and uninformed prosecutorial discretion.
- Would provide clear guidance to military judges and counsel on the scope of the defense.

Con:

- Adds complexity to otherwise simple cases.
- Potentially very broad; may effectively defer what should be a legislative determination of criminal conduct to individuals.
- If broadly applied to absence/disobedience offenses, may undermine the essential purpose of military law: to promote and preserve military discipline.
- If applied solely to other than absence/disobedience offenses, may be very limited in application.
- Changes will require modification to 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: Robinson, 2 CRIMINAL LAW DEFENSES, § 124 (1984); Model Penal Code, § 3.02; Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95 (1988); *US v. Rankins*, 34 M.J. 326 (CMA 1992); *US v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999); *US v. Washington*, 57 M.J. 394 (C.A.A.F. 2002).

Rule 916. Defenses

(m) *Necessity*.

(1) When a legally protected interest is unjustifiably threatened, and

(a) the accused's response is necessary; and

(b) no less drastic alternative response is available and sufficient;

the response may be justified by the defense of necessity, provided that the harm sought to be avoided is greater than the harm sought to be prevented by the law defining the offense charged.

(2) Necessity is not ordinarily a defense to disobedience of lawful orders or to absence offenses.

DA Pam 27-9, MILITARY JUDGES' BENCHBOOK, ch. 5, ¶ 5-5-1

5-5-1. Necessity.

The evidence has raised the issue of necessity in relation to the offense(s) of (). (There has been (testimony) (evidence) that (summarize evidence and contentions of the parties).) Necessity is a complete defense to the offense(s) of (). In general terms, necessity may justify a violation of the law in order to prevent or avoid a greater harm. For necessity to exist, you must first find that the accused violated the law and committed the offense(s) of (). Assuming you find the accused violated the law, necessity will justify the violation only if the act was done because the accused honestly and reasonably believed that it was necessary in order to avoid a greater evil or harm. The test here is whether, under the same facts and circumstances present in this case, an ordinary and prudent adult person faced with the same facts would believe that it was necessary to act contrary to the law in order to avoid a greater evil or harm. Second, the accused must actually have believed that his action was necessary to avoid the greater evil or harm. To determine whether the accused actually believed that his action was necessary, you must look at the situation through the eyes of the accused. (Summarize any pertinent information peculiar to this accused.) In order for the necessity defense to apply, the interest threatened by the evil or harm must be protected by law and the threat must be unjustified. Moreover, you are instructed that if the accused's response was not yet necessary, or if the response was needed but a less drastic and sufficient alternative was readily available, the defense of necessity does not apply.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of () (and to the lesser included offense(s) of ()), but also to the issue of necessity. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not legitimately act out of necessity.

Note that additional instructions would be required if issues involving the supremacy of society's balance or legislative preemption are raised, or if the offense is based on negligence or recklessness and the accused has negligently or recklessly created the conditions giving rise to the defense.

9-5 Dueling

Concise Statement of Proposal: Eliminate dueling offense (Art. 114).

Rationale:

While this article is rarely, if ever, used, the elimination of the article would unnecessarily eliminate several offenses related to dueling. There may be application of the article to drag racing or other dangerous competitions. Recommend no further consideration.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-6 Computer Crimes

Concise Summary of Proposed Change: Include a computer offense under Article 134 based on 18 USC 1030. A violation of 18 USC 1030 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 1030. According to CID, there have been few Army investigations of offenses under 18 USC 1030. Additionally, 10 USC 1030(d) provides that the United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under 10 USC 1030. The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (b)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 ([42 U.S.C. 2014\(y\)](#))), except for offenses affecting the duties of the United States Secret Service pursuant to section 3056(a) of Title 18, United States Code.

Rationale:

Pro:

- Creates specific elements for computer offenses in the UCMJ
- Creates model specifications for such offense

Con:

- Offense is already contained in 18 USC 1030
- There is no specific military offense that is not covered by 10 USC 1030

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

Other studies, articles, or information considered: The JSC is drafting training modules to instruct attorneys on computer crimes.

9-6 Add new Article 134 offense (Computer Offenses).

Article 134 (Computer Offenses)

a. Text. See paragraph 60.

b. Elements.

(1) *Communicate, deliver or transmit protected data.*

(a) That the accused knowingly accessed a computer without authorization or exceeding authorized access;

(b) That the accused by, means of such conduct, obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y of section 11 of the Atomic Energy Act of 1954 [[42 USCS § 2014](#)(y)];

(c) That the accused with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; and

(d) 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) *Obtaining protected information.*

(a) That the accused intentionally accessed a computer without authorization or exceeded authorized access, and thereby obtained--

(i) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act ([15 U.S.C. 1681](#) et seq.);

(ii) information from any department or agency of the United States;

or

(iii) information from any protected computer if the conduct involved an interstate or foreign communication; 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) *Unauthorized access to Government computer.*

(a) That the accused intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accessed such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States;

(b) That such conduct affected that use by or for the Government of the United States; 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.

(4) *Access protected computer with intent to defraud.*

(a) That the accused knowingly and with intent to defraud, accessed a protected computer without authorization, or exceeds authorized access, and;

(b) That the accused, by means of such conduct, furthered the intended fraud and obtained anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$ 5,000 in any 1-year period; 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.

(5) *Causing damage through the unauthorized use of a protected computer.*

(a) That the accused

(i) knowingly caused the transmission of a program, information, code, or command, and as a result of such conduct, intentionally caused damage without authorization, to a protected computer;

(ii) intentionally accessed a protected computer without authorization, and as a result of such conduct, recklessly caused damage; or

(iii) intentionally accessed a protected computer without authorization, and as a result of such conduct, caused damage;

(b) That by conduct described in clause (i), (ii), or (iii) of subparagraph (a), caused (or, in the case of an attempted offense, would, if completed, have caused)--

(i) loss to 1 or more persons during any 1-year period (and, for

purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least \$ 5,000 in value;

(ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(iii) physical injury to any person;

(iv) a threat to public health or safety; or

(v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security; 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.

(6) *Trafficking in passwords.*

(a) That the accused knowingly and with intent to defraud trafficked in any password or similar information through which a computer may be accessed without authorization, if--

(i) such trafficking affected interstate or foreign commerce; or

(ii) such computer was used by or for the Government of the United States; 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) *Threat to damage protected computer with intent to extort.*

(a) That the accused with intent to extort from any person any money or other thing of value, transmitted in interstate or foreign commerce any communication containing any threat to cause damage to a protected 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.

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

(1) "Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or

storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) "Protected computer" means a computer--

(a) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(b) which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

(3) "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) "Financial institution" means--

(a) an institution, with deposits insured by the Federal Deposit Insurance Corporation;

(b) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(c) a credit union with accounts insured by the National Credit Union Administration;

(d) a member of the Federal home loan bank system and any home loan bank;

(e) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(f) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934 [[15 USC § 780](#)];

(g) the Securities Investor Protection Corporation;

(h) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [[12 USCS § 3101](#)(1) and (3)]); and

(i) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(5) "Financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) "Exceeds authorized access" means to access a computer with

authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) "Department of the United States" means the legislative or judicial branch of the Government or one of the executive department enumerated in section 101 of title 5 of the United States Code;

(8) "Damage" means any impairment to the integrity or availability of data, a program, a system, or information;

(9) "Government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) "Conviction" shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) "Loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service;

(12) "Person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity; and

(13) "Traffic" means--

(a) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or

(b) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

d. Lesser included offenses. Article 80—attempts.

e. Maximum punishment. See maximum punishments at 18 USC 1030(c)

f. Sample specifications.

9-12 Fetal Demise by Violence Against Pregnant Woman

Concise Statement of Proposal: Clarify whether demise of an unborn but viable fetus is murder.

Rationale: Article 119a recently enacted by Congress and signed into law.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-13 Wrongful Cohabitation

Concise Statement of Proposal: Eliminate wrongful cohabitation (Art. 134) from the UCMJ.

Rationale:

This issue is a part of COL Barto's proposed revisions to the sex offenses of the UCMJ.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-14 Obstruction of Justice

Concise Statement of Proposal: Redefine obstruction of justice to reflect federal statutes.

Rationale:

The sub-committee should consider whether to recommend a narrow the application of Article 134 (obstructing justice) to more closely follow the federal statute – 18 U.S.C. 1503.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-13 Wrongful Cohabitation

Concise Statement of Proposal: Eliminate wrongful cohabitation (Art. 134) from the UCMJ.

Rationale: Covered in 9-1, revision of UCMJ sex offenses

Impact on other proposals for change:

Other studies, articles, or information considered:

9-14 Redefine Obstruction of Justice to Bring it Into Line with Federal Statute

Concise Summary of Proposed Change: Clarify Article 134 Offense to Delineate When Non-Coercive Pre and Post-Investigative Activities Constitute Obstruction of Justice. Redraft provision to make clear that “*corrupt non-coercive pre and post-investigative activities*” do constitute obstruction, but “non-corrupt” ones do not. This would cover asking witnesses to lie prior to or subsequent to the initiation of an investigation, but would not cover merely asking a witness not to report an offense. The provision would adopt the Army court’s long-held position on this issue, as well as specifically include acts that are arguably not currently prohibited by the statute without awaiting further delineation through case-law.

Discussion:

1. Elements of current provision (paragraph 96, UCMJ) plus suggested alternative:
 - a. That the accused wrongfully did a certain act;
 - b. That the accused did so in the case of a certain person against whom *the accused had reason to believe there were or would be criminal proceedings pending*;
 - c. That the act was done with the intent to influence, impede, or otherwise obstruct the *due administration of justice*; or
 - d. **That the act involved the knowing use of force or threat of force, intimidation, threats, misleading conduct, or corrupt persuasion of another person with the intent to hinder, delay, or prevent the communication to a law enforcement official of information relating to the commission or possible commission of an offense.**
 - e. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces

(italics added).

I also recommend adding the following to the explanation portion of paragraph 96c:

This offense also includes non-coercive corrupt attempts (i.e. non-threatening or intimidating) with the intent to hinder, delay, or prevent the communication of information relating to the commission or possible commission of an offense. “Corrupt persuasion” involves activities such as bribery or requesting that a witness lie to investigators but does not include mere requests that a witness not report an offense. Both coercive and non-coercive corrupt conduct either prior to or after the initiation of a criminal investigation may be covered by this provision.

The President’s current explanation of the offense states that it covers “by means of bribery, intimidation, misrepresentation, or force or threat of force

delaying or preventing communication of information relating to a violation of any criminal statute of the United States.” MCM, para. 96c. Other than bribery, this language does not include other types of *non-coercive conduct* (i.e. corruptly persuading a witness with the intent to delay or hinder reporting information about a criminal offense without the threat of force etc). In addition, the Army Court has ruled that this language even as currently drafted “exceeds the permissible limits of the military offense of obstruction of justice.” *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990). The Army court’s ruling on this matter may indeed be correct. The language of the military offense as currently drafted requires that one’s actions be done with the intent to obstruct the “due administration of justice.” The federal statute involving witness tampering, discussed below and from which the President’s language in the current explanation is derived, does not include that requirement, and the relevant statutory language is not included in the military offense.

In a series of cases including *Asfeld* which are discussed below, the Army court has ruled that merely requesting that a witness not report an offense is not obstruction of justice.

In 2001, the CAAF noted that it was declining to address the correctness of the *Asfeld* decision. *United States v. Barner*, 56 MJ 131, 135 (C.A.A.F. 2001). However, in *United States v. Arriaga*, 49 M.J. 9, 11 (C.A.A.F. 1998), the Court found “the President’s explanation of this offense [and in particular the delaying language] fully comports with our case law.”

I am unable to find a case where CAAF squarely faced the issue of whether non-coercive activities prior to the report of an offense or initiation of an investigation constitutes an offense. Without describing it as such, the CAAF has held that non-coercive and arguably non-“corrupt” activities following an initial report of wrongdoing are encompassed within the military offense as currently drafted. *United States v. Barner*, 56 M.J. 131 (C.A.A.F. 2001).

2. The military offense of obstruction of justice attempts to incorporate the entire field of interference with the “due administration” of justice that can occur during “criminal proceedings” (Paragraph 96a covers obstruction during administrative proceedings). In contrast, the federal offense of obstruction of justice is generally divided into the following relevant statutory provisions:
 - a. 18 U.S.C. §1503, Influencing an officer or juror generally; this provision is routinely referred to as the “omnibus” obstruction provision, and, as interpreted by most federal circuits, requires the pendency of some sort of judicial proceeding, knowledge of that pending proceeding on the part of the defendant, plus a nexus between the alleged obstructionist conduct and that proceeding. See *United States v. Aguilar*, 515 U.S. 593 (1995).

- b. 18 U.S.C. §1505, Obstruction of justice before agencies; departments and committees (currently covered by Art. 96a, UCMJ, wrongful interference with an adverse administrative proceedings);
- c. 18 U.S.C. §1509, Obstruction of court orders;
- d. 18 U.S.C. §1510, Obstruction of criminal investigations. This provision was enacted in 1967 to “plug a loophole” left by §1503, which required the pendency of a judicial proceeding; §1510 extends the protection afforded to witnesses and jurors in pending proceedings to informants and potential witnesses in federal criminal investigations before proceedings are initiated. *See Construction and Application of 18 U.S.C.A. 1510 Punishing Obstruction of Criminal Investigations*, 18 A.L.R. Fed 875 (2003).
- e. 18 U.S.C. §1511, Obstruction of state or local law enforcement;
- f. 18 U.S.C. §1512, Tampering with a witness, victim, or informant; This section was passed as part of the Victim and Witness Protection Act of 1982. §1512(b) includes a prohibition of acts including knowingly using intimidation, physical force, or threats or “corruptly persuad[ing]” another person with intent to, among other things, “hinder, delay, or prevent the communication to a law enforcement officer or judge of the US of information relating to the commission, or possible commission, of a federal offense . . .” The provision is clear that an “official proceeding need not be pending or about to be instituted at the time of the offense,” 18 U.S.C. §1512(f)(1). The term “corrupt persuasion” was added in 1988.

Corrupt persuasion makes it a crime to deter testimony through sheer persuasion, without the use of physical or economic threat, as long as one does so with a corrupt purpose. Corrupt persuasion includes communications that show an attempt to influence testimony. Jurisdictions have varied on the meaning of the term “corrupt,” and some have limited the reach of §1512 by defining ‘corrupt persuasion’ as persuading someone not to fulfill a legal duty.

Obstruction of Justice, 40 Am. Crim. L. Rev. 873 (2003) (footnotes omitted). Certainly, attempting to bribe someone to withhold information, and attempting to persuade someone to provide false information constitutes “corrupt persuasion.” There is a difference in approach in the circuits about whether merely attempting to persuade a witness to withhold cooperation or not to disclose information to law enforcement officials, as opposed to actively lying, falls within the ambit of §1512. *See United States v. Khatami*, 280 F.3d 907 (9th Cir.), *cert denied*, 535 U.S. 1068 (2002), and cases cited therein. *See also United States v. Arthur*

Andersen, LLP, 2002 U.S. Dist. LEXIS 26870 (S.D. Tex. 2002) (statute covers persuading others to shred documents (not otherwise an offense) with the intent to keep information from the SEC).

I am unable to find a federal case that discusses non-coercive witness tampering *prior to* the initiation of any investigation, for example, where the defendant says to a witness, "Don't report me," or "Don't tell them anything," but there is no investigation of any kind ongoing at that point.

- g. 18 U.S.C. §1513, Retaliating against a witness, victim, or informant.
3. The basic nature of the offense of obstruction of justice was defined by the Court of Military Appeals in [*United States v. Long*, 6 C.M.R. 60, 65 \(C.M.A.1952\)](#), where the Court stated: "The essence of the offense denounced . . . is the obstruction or interference with the administration of justice in the military system."
 4. The scope of the military offense of obstruction of justice is the subject of recurring litigation, particularly in those instances where there is no criminal investigation ongoing at the time of the alleged obstruction of justice. Case law attempts to draw the distinction between acts that merely try to prevent or hinder discovery of criminal wrongdoing (not an offense), and acts intending to obstruct the "due administration" of justice. The case law is also not clear as to what *non-coercive conduct* (for example, "don't report me" versus "lie for me") constitutes obstruction of justice, and does not discuss the cases in that area include the following:
 - a. *United States v. Barner*, 56 M.J. 131 (C.A.A.F. 2001) (obstruction of justice conviction upheld where, following report of accused's offenses to an NCO, but prior to initiation of criminal investigation, accused approached witnesses and exhorted them "not to tell," that he would "do anything if you don't tell," as well as other statements; because appellant believed some law enforcement official of the military would be investigating his actions, evidence legally sufficient).
 - b. *United States v. Arriaga*, 49 M.J. 9 (C.A.A.F. 1998) (lying to investigative agents constitutes obstruction of justice under Article 134, UCMJ; declining to extend the Supreme Court's ruling interpreting 18 U.S.C. 1503 in *United States v. Aguilar* to the military). In *Aguilar*, the Supreme Court ruled that the "due administration of justice" clause of 18 U.S.C. 1503 (also present in the military offense) can be applied only to protect proceedings and persons related to an actual grand jury investigation or trial; as such, lying to a federal agent not connected to an ongoing grand jury investigation or trial was not prohibited by 18 U.S.C. 1503.

- c. *United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993) (under facts of case, where factfinders could conclude beyond a reasonable doubt that accused “had reason to believe there would be criminal proceedings pending” and that his actions were done with the intent to obstruct” those proceeding, offense of obstruction of justice is committed even where investigation had not commenced. Under the facts (commander’s personal weapon missing), “an investigation was inevitable”).
- d. *Finsel* distinguished *United States v. Athey*, 34 M.J. 44 (C.M.A. 1992), and *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991). In *Athey*, the Court reversed an obstruction of justice conviction where the accused made statements to a witness that “nobody knew anything about what had happened,” and “promise me that you won’t say, that you won’t tell what happened.” Under the unique circumstances of the case, the Court found that the accused did not subjectively believe there “would be criminal proceedings pending, i.e. that his criminal acts would be the subject of a criminal investigation. “Someone who never even foresees that a criminal proceeding may take place cannot intend to obstruct it.” Thus, “ignorance of peril ironically becomes a matter of defense.” In *Turner*, the Court held that submission of a tampered urine sample as part of a unit inspection did not constitute the offense of obstruction of justice. While such an act attempted to preclude discovery of her wrongful use of cocaine, the actual tampering impeded an inspection, not a criminal investigation.
- e. *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990) (accused’s comment, “Don’t report me,” was not obstruction of justice; instead it was merely an attempt to conceal a crime, which does not establish a specific intent to subvert or corrupt the administration of justice). The Court held the alleged conduct “was intended only to forestall or preclude discovery of an offense, an intent which does not amount to an attempt to interfere, impede or obstruct the ‘due administration’ of military justice.”

In contrast, as noted above 18 U.S.C. §1512 punishes one who:

knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .

By its language, section 1512 does not require interference with the “due administration” of justice. The military offense does include such a requirement for all forms of obstruction of justice.

- f. *See also United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992) (requesting witnesses not to “press charges” is not obstruction of justice).
 - g. *See also United States v. Gray*, 28 M.J. 858 (A.C.M.R. 1989) (no obstruction of justice where accused merely told witnesses “not to discuss” his criminal activities with anyone; there must be some allegation that an official authority has manifested an official act, inquiry, investigation, or other criminal proceeding with a view to possible disposition within the administration of justice of the armed forces before an act of mere concealment could amount to an obstruction of justice).
 - h. *Compare to United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989) (obstruction of justice conviction upheld where accused, after committing offense of aggravated assault, told witnesses to lie to criminal investigators).
 - i. *Note: The CAAF has expressly left open the question whether Asfeld and Gray were correctly decided. See Barner, supra.*
5. Other sources: David Jividen, *Charging Post-Offense Obstructive Actions*, 40 A.F. L. Rev. 113 (1996).

9-15 Quarantine

Concise Statement of Proposal: Eliminate violation of quarantine (Art. 134) from the UCMJ.

Rationale:

With new outbreaks of SARS and “chicken flu,” this proposal should not be considered. This proposal would likely be opposed by OTSG.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-17 Article 88

Concise Statement of Proposal: Amend Art. 88 to limit its application to public pronouncements in a military capacity or statements that sow dissention.

Rationale: This proposal undermines the concept that soldiers are on duty 24 hours a day and represent the military both in and out of uniform. Adoption of this proposal would send the wrong signal to service members.

Impact on other proposals for change:

Other studies, articles, or information considered:

9-18 Drunkenness Offenses

Concise Statement of Proposal: Consolidate drunkenness offenses.

Rationale: While an interesting idea, there is no pressing need to consolidate. The offenses in Art. 111 (drunk driving) differ in kind from those in Art. 134 (drunk in public, providing liquor to prisoner, etc.)

Impact on other proposals for change:

Other studies, articles, or information considered:

9-23 NCO Fraternization

Concise Statement of Proposal: Add an offense dealing with NCO fraternization.

Rationale: Army case law and the Benchbook establish this offense under Art. 134, but it is more likely to be addressed as an Art. 92 violation. The concept of “NCO fraternization” is properly addressed in AR 600-20, which prohibits improper senior subordinate relationships.

Impact on other proposals for change:

Other studies, articles, or information considered:

10-1 R.C.M. 1001(e)(2)(C) Stipulations

Concise Statement of Proposal: Amend R.C.M. 1001(e)(2)(C) to require that the opposing party agree only to a stipulation of expected testimony, rather than a stipulation of fact, when the personal presence of a witness is not otherwise required.

Rationale: Do not amend the rule to require only a stipulation of expected testimony. In the alternative, amend the subparagraph as follows: “(C) The party opposing personal appearance of the witness refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony. The party opposing personal appearance may nevertheless rebut any relevant statements of opinion contained within the stipulation of fact;”. Currently, the military judge may order the government to produce a witness if a party refuses to enter a stipulation of fact concerning the witness’ testimony. Under R.C.M. 1001(b)(5), a sentencing witness may properly testify in the form of an opinion regarding the accused’s duty performance and rehabilitative potential. Under the current R.C.M. 1001(e)(2)(C), it appears that an opposing party could not contradict such statements of opinion, because they are contained within a stipulation of fact. The original proposed amendment would allow the opposing party to rebut these opinions—in addition to any factual assertions—because they are contained in a stipulation of expected testimony. Allowing the opposing party to do so would unfairly benefit the opposing party (usually the government) and would be contrary to the purpose of the rule. As discussed in *U.S v. Briscoe*, the rule is designed as a trade-off. The defense gives up the benefit of the witness’ personal appearance, which presumably enhances the witness’ credibility, and the government gives up the ability to contradict the witness’ factual assertions. In the government is unwilling to surrender this ability by signing a stipulation of fact, they should produce the witness. The alternative proposal would still allow the opposing party to rebut the witness’ opinions, which is appropriate.

Impact on other proposals for change. None. However, the military judge will need to modify the stipulation of fact instruction to account for any opinions offered as part of a stipulation of fact, and the Benchbook should address such a situation.

Other studies, articles, or information considered. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002) (discussing the history of the rule). *United States v. Mitchell*, 41 M.J. 512 (Army Ct. Crim. App. 1994).

10-2 Admissibility of Evidence at Sentencing

Concise Summary of Proposed Change: Relax or eliminate the rules of evidence at presentencing proceedings, consistent with the federal district court practice (Fed. R. Evid. 1101(d)(3)).

Rationale: The sentencing authority should have all relevant and reliable information sufficient to determine an appropriate sentence. This proposal would eliminate a current impediment to the presentation of such evidence at the presentencing proceeding: the military rules of evidence.

Pro:

- First and foremost, there will be a greater quantity of relevant and reliable information available to the sentencing authority in fashioning appropriate sentences.
- Eliminates gamesmanship and levels the playing field for both parties. Currently, the rules encourage a certain amount of gamesmanship at the presentencing proceeding, because the rules of evidence may be relaxed only upon defense request. Upon such a relaxation of the evidentiary rules, the rules may also be relaxed during the government's rebuttal, but only "to the same degree" as they were relaxed for the defense. Therefore, the defense essentially controls whether the rules of evidence apply (and to what extent they apply) during presentencing proceedings.
- Victims will no longer have to appear in court and subject themselves to cross-examination during presentencing. Their written statements will be admissible, provided that they are relevant and reliable.
- Any arguable prejudice to the accused is alleviated by maintaining the current discovery rules, the adversary nature of the proceedings, and MRE 403. Defense will maintain its right to rebut all the government's evidence and present all extenuation and mitigation evidence. Furthermore, the defense will still be able to argue that the sentencing authority give limited weight to certain evidence. Finally, unlike the federal sentencing structure, court-martial panel members often determine the sentence. Therefore, MRE 403 should still apply.

Con:

- Elimination of the rules of evidence arguably undermines the adversarial nature of presentencing proceedings, an important aspect of the courts-martial process (keeping in mind that guilty pleas make up the vast majority of courts-martial).
- The current rule balances the government's ability to present admissible information about the accused (through service records and relevant testimony

regarding aggravation and rehabilitation potential) with the defense's ability to control the scope of admissible evidence through a request to relax the rules of evidence.

- Comparing sentencing proceedings in federal district court and courts-martial is inapposite. Federal practice relies on professional, court-supervised personnel to gather data and prepare presentencing reports. Such a procedure would be too cumbersome and expensive for application in the portable military justice system. Adopting this proposal may create the conditions to evolve into a requirement for presentencing reports.

Impact on other proposals for change: Use of presentencing reports.

Other studies, articles, or information considered: Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986).

RULES FOR COURTS-MARTIAL
CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

- (i) service data relating to the accused taken from the charge sheet;
- (ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;
- (iii) evidence of prior convictions, military or civilian;
- (iv) evidence of aggravation; and
- (v) evidence of rehabilitative potential.

(B) Presentation by the defense of evidence in extenuation or mitigation or both.

(C) Rebuttal.

(D) Argument by the trial counsel on sentence.

(E) Argument by the defense counsel on sentence.

(F) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(4) *Evidentiary rules.* The Military Rules of Evidence (other than with respect to privileges and Mil. R. Evid. 403 and 412) do not apply to presentencing proceedings. All reasonably reliable evidence that is relevant under the provisions of subparagraphs (a)(1)(A) through (a)(1)(C) above shall be admitted into evidence unless otherwise prohibited.

(4) *Rules of evidence relaxed.* The military judge may relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

.....

(c) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

.....

(d) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge.

MILITARY RULES OF EVIDENCE

SECTION XI MISCELLANEOUS RULES

Rule 1101. Applicability of rules

(a) *Rules applicable.* Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited factfinding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

(b) *Rules of privilege.* The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings.

(c) *Rules relaxed.* The application of these rules may be relaxed ~~in sentencing proceedings as provided under R.C.M. 1001 and otherwise~~ as provided in this Manual.

(d) *Rules inapplicable.* These rules (other than with respect to privileges and Mil. R. Evid. 412) do not apply in investigative hearings pursuant to Article 32; presentencing proceedings; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

10-4 Abolish Parole

Concise Statement of Proposal: Abolish the parole system to create “truth in sentencing” and to alleviate burden of administering the program.

Rationale: There is no right of parole conferred on an inmate serving confinement in a military prison. DODI 1327.5, Administration of Military Correctional Facilities and the Clemency and Parole Authority provides inmates with the administrative privilege of parole. Paragraph 6.16.3 requires each Service Secretary to establish a Clemency and Parole Board to execute the parole program. The Army implements the parole program through AR 15-130.

Parole eligibility:

None if serving sentence less than 12 months or sentenced to death.

At one-third of sentence if serving 12 months to less than 30 years.

At 10 years if serving 30 years to life. (at 20 years if serving life).

If granted parole, the parolee is administered by the United States Parole Office. The parolee remains in a parole status until balance of confinement terminates. If parolee commits misconduct during period of parole, the parole may be revoked and the parolee returned to confinement. Inmates have the option to refuse parole.

In 2002, the Army Correction System implemented the mandatory supervised release (MSR) program for inmates serving confinement for a crime committed after August 2001. Under this program an inmate is released upon reaching his minimum release date. The minimum release date is calculated by adding potential good time credit and work abatement credit (as well as other credit). The inmate is supervised until the balance of confinement terminates. The supervision is administered by the United States Parole Office. There is little practical distinction between MSR and parole. Inmates transferred from military custody to the Federal Bureau of Prisons are not administered by the military services clemency and parole systems.

Recommend against abolition of parole. To meet objective of proposal, both parole and MSR would have to be abolished. Further, the military corrections system would have to be revised, abolishing the minimum release dates.

As currently structured, the parole system provides a structured release back into society for released inmates. Additionally, the administrative requirement on the military is not significant since the United States Parole Office administers the supervision of those released.

Impact on other proposals for change: Abolition of the parole system may impact on the Victim-Witness Program.

Other studies, articles, or information considered: Consultation with the Command Judge Advocate, United States Disciplinary Barracks. DODI 1327.5, AR 15-130, USDB Regulation 600-1, and Legal Advisor, Army Review Boards Agency briefing slides.

10-5 Eliminate Sentence Hearing in Pretrial Agreement Cases

Concise Statement of Proposal: Eliminate the sentencing hearing in cases where there is a Pretrial Agreement – the Pretrial Agreement (i.e., The Deal) becomes the sentence.

Rationale:

(1) The proposal would eliminate the sentencing hearing in those cases where the Government and Accused have negotiated a pretrial agreement. The terms of the pretrial agreement affecting punishment (i.e., Reprimand, Forfeiture of Pay and Allowances, Fine, Reduction in Pay Grade, Restriction, Hard Labor w/out Confinement, Confinement, and Punitive Separation) would be the sentence. Capital cases would be unaffected because of the prohibition of pleading guilty in a case referred capital. See Rule for Courts-Martial (R.C.M.) 910(a)(1).

(2) The proposal would theoretically stream line (i.e., shorten) the court-martial process eliminating the need to call witnesses and present evidence during the presentencing portion of the trial. Similarly, the trial costs would be minimized by reducing travel, lodging, and per diem costs normally associated with calling sentencing witnesses at trial. Finally – unit personnel, normally members of the chain of command (e.g., Squad Leader, Platoon Sergeant, Platoon Leader, First Sergeant, Commander, etc.), would be free to focus on their military mission because neither the Government nor the Defense will be calling members of the chain of command to talk about the impact on the unit of the accused's crimes or to testify about the accused's duty performance or rehabilitative potential.

(3) Pros: The time for a guilty plea would be reduced by anywhere from 25% to 75%, if not more. Additionally, the Accused and Government will be able to negotiate for an appropriate punishment before trial and neither side would be "surprised" by the sentence adjudged by the Court (i.e., Military Judge or Panel).

(4) Cons:

(a) In all likelihood, the number of Guilty Pleas will decline and the number of contested cases will increase, thus defeating the "time and money savings" that would necessarily flow from those cases resulting in negotiated plea agreements. Under the current system, pretrial agreements act as "insurance" for an accused with the accused hoping to "beat the deal" after exercising his R.C.M. 1001 rights.

A sentence cap in a court-martial PTA is not a grant of clemency nor is it a true plea bargain as often seen in civilian practice. Rather, it is more like a flood insurance policy on a house. You buy flood insurance, not because you want your house flooded, but because you want to put a ceiling on your loss if disaster strikes. In a court-martial, the PTA merely puts a ceiling on what would otherwise be a

significantly high maximum punishment provided by law--a sentence insurance policy. In a bench trial, the judge is not aware of what the cap is. In a trial with court members, the members are not even aware that a PTA exists. The accused actually tries to "beat" the PTA at trial by arguing for a sentence below the cap, and the prosecutor usually argues for a sentence above the cap contemplating that the court will give something less. See [United States v. Kinman, 25 M.J. 99, 101 \(C.M.A. 1987\)](#).

[United States v. Griffaw, 46 M.J. 791, 792 \(A.F. Ct. Crim. App. 1997\)](#).

- (b) The proposal vests too much discretion in the Trial Counsel, Command and the Convening Authority. Criticisms associated with the current Federal Sentencing Guidelines that allege prosecutors can manipulate the sentence range by creative charging and manipulation of facts would be equally applicable to the proposed scheme.
- (c) Under the current system, a fundamental right of the accused is the right to a "complete sentencing proceeding." See R.C.M. 705(c)(1)(B). The proposal does away with this right arguably rendering the trial an "empty ritual." See [United States v. Libecap, 57 M.J. 611 \(C.G. Ct. Crim. App. 2002\)](#); [United States v. Edwards, 58 M.J. 49 \(2003\)](#).
- (d) The proposal does away, in guilty plea cases, with the accused's "broad right of allocution." See e.g., [United States v. Matthews, 13 M.J. 501 \(A.C.M.R. 1982\)](#); [United States v. Grill, 48 M.J. 131 \(1998\)](#); [United States v. Britt, 48 M.J. 233 \(1998\)](#); and [United States v. Jeffery, 48 M.J. 229 \(1998\)](#). See also, R.C.M. 1001(c)(2).
- (e) Implementation of the proposal will likely result in a greater disparity in sentences than exists under the current sentencing scheme because sentences will be dependent on the views of differing Convening Authorities. Additionally those pleading not guilty would be afforded greater rights at sentencing than someone saving the Government the time and expense of a contested case.

Impact on other proposals for change: Unaffected by other proposals. RCM 705 and 1001 would necessarily be modified to allow the accused to bargain away his right to a "complete sentencing proceeding," a term currently prohibited from insertion in a pretrial agreement.

Other studies, articles, or information considered: None directly on point. Articles worth noting, however, are those that address the Federal Sentencing Guideline and whether they vest too much discretion in Federal Prosecutors. Similar criticism would be applicable to a sentencing scheme that is largely controlled by the prosecutor and his or her charging decisions in a case. See e.g., William J. Powell and Michael T. Cimino,

Prosecutorial Discretion Under The Federal Sentencing Guidelines: Is The Fox Guarding The Hen House?, 97 W. Va L. Rev. 373 (1995).

10-7 Permit Administrative Elimination as Sentence

Concise Statement of Proposal: Permit members to recommend administrative elimination.

Rationale: The proposal would give members greater flexibility in adjudging an appropriate sentence at court-martial, where the members believe that a punitive discharge is not appropriate (given the stigma attached thereto), but that the needs of good order and discipline would be served by administratively eliminating the accused. Currently, RCM 1003(b)(8) specifically prohibits a court-martial from adjudging an administrative discharge.

Pro: Gives members another means to meet the needs of good order and discipline while not stigmatizing an accused with a punitive discharge.

Con: Administrative elimination is not a disciplinary tool. Administrative eliminations are an Army management tool to maintain the fighting force. Further, the injection of Army policy could be considered unlawful command influence.

Impact on other proposals for change: (1) Proposal as written does not account for sentencing by a military judge. Sentencing by a military judge in all cases except capital cases is another proposal.

Other studies, articles, or information considered: Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986).

10-8 Restitution as Punishment

Concise Statement of Proposal: Restitution as an authorized court-martial punishment

Rationale:

The only mechanisms currently available to a victim of an economic crime in the military is to follow the procedures of Article 139, UCMJ or file suit in a local court, ordinarily small claims court. Article 139 has complicated, time-sensitive procedures. Local civil suits have jurisdictional limits and ultimately may leave the victim alone to seek enforcement. Additionally, victims stationed overseas have no access to seek restitution in small claims court.

The Victim and Witness Protection Act of 1982 and the Mandatory Victims' Restitution Act of 1996 provide victims of certain crimes with compensatory damages through the federal criminal court process. A detailed pre-sentencing report addresses damages and the economic status of the perpetrator. The court determines an appropriate payment schedule, choosing from lump sum or a payment plan. The court then issues a restitution order outlining the loss, type of restitution, and payment schedule. The restitution order is enforceable, if violated, through the same mechanisms as a civil judgment.

Amending Article 57 and R.C.M. 1003 to include restitution as ordered by a court-martial may provide the victim a more streamlined method of receiving compensation for loss. Too often, restitution enforcement becomes part of the pretrial agreement process.

The scope of what is compensable would have to be finely defined as well as the provisions for enforcement.

Impact on other proposals for change: Amend Article 57 and R.C.M. 1003

Other studies, articles, or information considered: 18 U.S.C. section 3663a and *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, Major David M. Jones, USMC.

10-9 Sentencing Authority Permitted to Suspend Punishments

Concise Summary of Proposed Change: Permit the sentencing authority to suspend all or parts of a court-martial sentence with the conditions of suspension determined by the sentencing authority.

Rationale: The proposal would permit the sentencing authority, either the military judge or the members, to suspend all or part of a court-martial sentence and set the conditions for that suspension. Currently, such suspension is within the sole discretion of the convening authority (RCM 1108). The sentencing authority is able to recommend suspension in conjunction with the announced sentence (RCM 1106(d)(3)(B)) or as part of an accused's submission of matters in clemency to the convening authority (RCM 1105(b)(2)(D)), but that recommendation is not binding.

Pro:

- The power to suspend part or all of an adjudged sentence is a useful tool in fashioning an appropriate sentence. However, this tool is currently only available to the convening authority. Consequently, sentencing authorities often face a difficult decision of adjudging sentences that they regard as either too harsh or too lenient, in light of the accused's potential for rehabilitation. In other words, the inability to suspend leads sentencing authorities to adjudge skewed sentences which they view as unduly harsh or unduly lenient. Giving sentencing authorities the power to suspend sentences would remove the all or nothing nature of the choice between unduly harsh or unduly lenient sentences and enable them to impose a sentence they deem just under all the circumstances.
- Particularly in the case of a court-martial by military judge alone, the sentencing authority is in the best position to make an informed decision regarding suspension of the sentence. Rather than basing the suspension decision on a cold record of trial, the sentencing authority makes a decision after presiding over the trial and presentencing proceedings. The sentencing authority, rather than the convening authority, has a unique perspective from which to evaluate the accused and the evidence regarding the merits of a suspension.
- Just as civilian courts use the probation system to rehabilitate an offender, courts-martial could use a suspension to give an offender a chance for rehabilitation and enable the soldier to demonstrate that he can render useful military service. In other words, this proposal would give a deserving soldier the opportunity to "soldier back" from his misconduct and demonstrate his rehabilitative potential after the court-martial.
- The convening authorities' legitimate interests (see cons below) will not be impaired by this proposal, provided that the convening authority retains three essential prerogatives: (1) the power to vacate a suspension for cause in light of the soldiers subsequent misconduct or failure to fulfill the conditions of the

suspension; (2) the power to suspend a sentence himself for reasons of military exigency or clemency; and (3) through counsel, to acquaint the court with arguments against suspension.

Con:

- Commanders may resent a binding decision by the sentencing authority to suspend a sentence that the commander wants enforced. Commanders may see this as an interference with the exercise of command prerogative. Unlike the civilian system, decisions to retain or discharge a soldier have an enormous impact on others in the command. These are the kinds of decisions that commanders, who are responsible for the morale and mission readiness of their commands, must make.
- Unlike civilian courts, which must suspend a sentence if a convicted defendant is to receive any compassion, military courts understand that, even if they cannot suspend a sentence, the convening authority may do so. Review and action by the convening authority constitutes a protection against unreasonably harsh sentences in the military justice system not found in civilian courts.
- The convening authority is arguably uniquely situated to make the decision whether or not to suspend. The information that the convening authority either possesses or has ready access to cannot be easily presented to the sentencing authority during presentencing proceedings. Although some of this information could be presented in court, it would burden the system to present it.
- The deliberation and voting process will be much more complicated in a panel case, because many more options (conditions of the suspension, what punishment to suspend, length of suspension, etc.) will now be available to the panel.
- The President would have to promulgate new rules to govern who monitors the accused's compliance with the conditions of suspension, to specify who would act to vacate the suspension (original sentencing authority or convening authority?), and to limit the sentencing authority's creativity with respect to the conditions of the suspension.

Impact on other proposals for change: Recommendation by members for administrative elimination of an accused; elimination of sentencing when a pretrial agreement exists; use of presentencing reports; and sentencing done by military judge alone in all noncapital cases.

Impact on the UCMJ and MCM:

- Amend Article 57 to address effective dates of sentences.

- Amend Articles 60 and 64 to address effect of suspended sentences on initial action by convening authority.
- Amend RCM 1001. Relax or eliminate the rules of evidence in presentencing proceedings.
- Amend RCM 1003 to allow the sentencing authority to suspend all or part of sentence.
- Amend RCM 1005 to provide detailed guidance to the military judge in instructing panel members on their power to suspend an adjudged sentence. These instructions should include guidance on the advantages and disadvantages of suspending a sentence, with particular focus on the impact on the command.
- Amend RCM 1006 to establish guidelines for voting on whether to suspend a sentence. Should each member first vote for a proper sentence, without considering the option of suspending the sentence, and then vote regarding suspension of the sentence? Should the required number of votes be the same for suspension? How will the panel members vote on the terms of the suspension (particular punishments suspended, length of suspension, conditions of suspension, etc.)?
- Amend RCM 1007 to establish how the terms of the sentence will be announced to the accused.
- Amend RCM 1107 to address the effect that a suspended sentence will have on the convening authority's action.
- Amend RCM 1108 (unless vacation authority remains solely within the power of the command) to address vacation of suspension of sentence.

Other studies, articles, or information considered: Advisory Commission Report on the Military Justice Act of 1983. (The advisory commission conducted hearings and made recommendations on this issue in 1983. They recommended that the sentencing authority remain solely with the command.)

10-10 Military Judge Alone Sentencing

Concise Statement of Proposal: All sentencing in courts-martial to be done by the military judge alone except in capital cases.

Rationale: The proposal would eliminate members sentencing, except in capital cases.

This proposal was studied and well-argued on both sides in the information cited below.

As was the case in 1983 and 1996, no compelling reason exists to change the current system. The importance of the community's voice spoken through members in condemning an accused's actions cannot be underestimated. Eliminating a right of the accused without sufficient cause will subject the military justice system to further criticism.

Common arguments made in support – that the system will be more efficient and that sentences will be more uniform – is without empirical support. In further support of judge-sentencing is the argument that the members are not qualified to determine an appropriate sentence because they have neither the training nor the background to understand the principles of sentencing. While military judges, it must be conceded, are trained in the law and have an understanding of the collateral effects of a sentence, they are no more qualified to grasp the sociological and psychological reasons for sentencing as anyone else who might serve as a member.

Impact on other proposals for change: Relaxation or elimination of the rules of evidence; elimination of sentencing when a pretrial agreement exists; use of presentencing reports.

Other studies, articles, or information considered: Advisory Commission Report on the Military Justice Act of 1983; Report of the Process Action Team on Improving Military Justice Legal Processes (15 March 1996); Major James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994).

10-11 Remove Hard Labor Without Confinement

Concise Statement of Proposal: Eliminate hard labor without confinement as a court-martial punishment.

Rationale:

R.C.M. 1003(b)(6) provides for hard labor without confinement as a permissible punishment adjudged by a court-martial. The maximum hard labor without confinement to be adjudged is three months. The discussion states, "hard labor without confinement is performed in addition to regular duties..." Traditionally, hard labor without confinement is interpreted to be consistent with extra duty performed pursuant to imposition of nonjudicial punishment since the immediate commander designates the amount and character of the labor performed.

Punishment to hard labor without confinement allows the court-martial flexibility to punish the wrongdoer in a visible way without sending the accused to confinement. This flexibility becomes important in those cases of refusals of nonjudicial punishment in which it may be appropriate to render a sentence closer to Article 15 punishment.

Recommend keeping hard labor without confinement as a punishment.

Impact on other proposals for change: None

Other studies, articles, or information considered: None

10-12 Eliminate Bad-Conduct Discharge and Dishonorable Discharge Distinction

Concise Statement of Proposal. Eliminate distinction between dishonorable discharge and bad conduct discharge.

Rationale: A scientifically valid study and coordination with other government agencies is required before taking action on this proposal. It is unclear whether the general public and civilian employers recognize and difference between a BCD and a DD and to what extent, if any, this distinction influences their decisions. Until we can answer these questions, it is unwise to propose a change that may have far-reaching secondary effects. A number of federal laws and agency policies rely on the distinction. For example, entitlements to the death gratuity, Discharge Review Board consideration, employment assistance, survivor and dependent educational assistance, DIC and numerous veterans' preferences are not available to those who receive a DD (see attached summary of separation benefits). Thus, it makes sense to consult with the appropriate agencies and to assess how such a change would affect their policies and procedures before drafting a proposal.

Impact on other proposals for change. None

Other studies, articles, or information considered. Department of Veterans Affairs, *Federal Benefits for Veterans and Dependents* (2003).

10-14 Sua Sponte Authority to Defer Forfeitures

Concise Summary of Proposed Change: Amend UCMJ to permit the convening authority to defer forfeitures sua sponte for benefit of the family. Recommend that this proposal not be adopted.

Rationale:

Pro:

- Would allow families to obtain financial support prior to action being taken.
- Provides the convening authority with additional discretion in caring for military families.

Con:

- Recent legislative changes allow dependents, who are victims of violence by the accused, to receive transitional compensation following the adjudged sentence.

Impact on other proposals for change or the military justice system: If approved, proposal 12-1 will eliminate the need for this proposal as the convening authority will be required to take action 30 days after the court-martial sentence is adjudged.

Other studies, articles, or information considered: UCMJ Articles 57, 58b and 60.

Text of Proposed Change:

None.

10-15 Eliminate Automatic Reduction

Concise Statement of Proposal: Eliminate the automatic reduction by sentence to confinement or permit restoration of rank after release if not sentenced to reduction.

Rationale: The Army and Navy Departments' implementing regulations currently provide for automatic reduction to the grade of E-1 upon conviction at court-martial and sentence to, whether suspended or not,¹ a punitive discharge or confinement in excess of 180 days or six months and ninety days or three months, respectively. The Air Force requires, as part of the approved sentence, a reduction and either confinement, a punitive discharge, or hard labor without confinement before an airman is automatically reduced, but only to the reduced grade approved as part of the adjudged sentence (i.e., there is no automatic reduction to the grade of E-1). The Coast Guard does not permit an automatic reduction. The proposal, therefore, would bring the Army and Navy Departments in line with the Coast Guard policy and the practical effect of the Air Force policy.

Pro: The proposal gives meaning to a court-martial sentence that includes only an intermediate reduction or no reduction, but otherwise triggers UCMJ, article 58a. The elimination of the automatic reduction provision gives the sentencing authority the opportunity to send a Sailor/Marine or Soldier to confinement for greater than ninety or 180 days, respectively, and to adjudge an intermediate reduction or no reduction that will be effected. A sentencing authority may deem a longer period of confinement appropriate, but a reduction to E-1 as excessive. Therefore, the proposal carries out a sentencing authority's true intent. The proposal should be broadened to allow for a sentence to hard labor without confinement to also not trigger the article. Any amendment should make clear that if a servicemember is confined, s/he does not serve in confinement at their pre-court-martial or intermediate reduced rank to ensure the penological concerns are addressed (where an NCO might be the superior of a guard and attempt to use that disparity in rank to the detriment of facility discipline).

Con: On a macro level, however, a servicemember convicted at trial, who then serves a sentence of confinement should not return to the unit at the same rank held at trial or an intermediate rank. Such a dilution of the deterrent effect of reduction to the grade of E-1 should not be permitted and Congress's intent should not be disregarded. The statute permits the Service secretaries to make an implementation decision based on the needs of the individual services. The Army and Navy Departments have

¹ A draft of AR 27-10, para. 5-28e would require automatic reduction only in the event of an *unsuspended* punitive discharge or a term of confinement in excess of 180 days or six months. An ambiguity exists in the current draft regarding hard labor without confinement, for which the School will offer an amendment to make it clear that an unsuspended period of hard labor without confinement will trigger a reduction. These changes to AR 27-10 are required to resolve an apparent conflict between it and AR 600-8-19, Chapter 7.

determined that if a Soldier, Sailor, or Marine is confined for the requisite time period or punitively discharged, that servicemember cannot return to the unit at the pre-court-martial rank or any intermediate rank. The needs of good order and discipline would be undermined if the Service Secretaries could no longer make that service-specific determination. If it is determined that a change is needed, a middle ground might be to adopt the draft proposal of AR 27-10, para. 5-28e, which eliminates the automatic reduction for *suspended* sentences to confinement, hard labor without confinement, or a punitive discharge. There does not appear, however, sufficient justification to abandon *in toto* the current policy decisions made by the Army and Navy Departments.

Impact on other proposals for change: None.

Other studies, articles, or information considered: For the Services' implementation of Article 58a: AR 27-10, para. 5-28e; JAGMAN, 0152c(1); AFI 51-201, para. 9.10; MJM, para. 4.E.1. *United States v. Lundy*, 58 M.J. 802 (Army Ct. Crim. App. 2003) (discussing the history of UCMJ art. 58a); *United States v. Simpson*, 27 C.M.R. 303 (C.M.A. 1959) (invalidating para. 126e of the 1951 Manual for Courts-Martial, which precipitated Congress's passage of Article 58a).

10-16 Presentence Reports

Concise Statement of Proposal: Eliminate the presentencing hearing and instead use written presentencing reports.

Rationale:

Pro: This proposal would bring the military justice sentencing process more in-line with the federal criminal system. Fed.R.Crim.P, Rule 32.

Additionally, it could have the potential of saving the military money by eliminating the costs of producing live witnesses.

Con: Adopting this procedure would likely result in additional delays in the court-martial process. Currently, presentencing hearings in the military convene immediately, or shortly, after the findings are announced. Requiring the production of a lengthy and detailed presentencing report, allowing the defense time to review it and object to its contents, and litigating any such objections, could add considerable processing time.

Additionally, money that is saved on travel expenses for witnesses could potentially be lost in having to hire and train individuals to create these presentencing reports. In the federal system, parole officers are responsible for creating these reports. Fed.R.Crim.P, Rule 32(c)(1). Within the military, no equivalent position currently exists.

Impact on other proposals for change:

1) Amend RCM 1001(e)(2)(C) to require only that the opposing party agree to stip of expected testimony rather than fact when personal presence not required.

2) Relax or eliminate rules of evidence at sentencing, consistent with practice in US Dist. Ct. (FRE 1101(d)(3))

5) Eliminate sentencing hearing when PTA exists: deal is the sentence.

Other studies, articles, or information considered: Fed.R.Crim.P, Rule 32

10-17 Life Without Parole (LWOP) Sole Alternative to Death

Concise Summary of Proposed Change: Make LWOP only option other than death in capital cases. Recommend that this proposal not be adopted.

Rationale:

Pro:

- Would ensure that accused convicted of capital offenses serve, at a minimum, 20 years of confinement. At present an accused sentenced to confinement for life would be eligible for parole after serving 10 years in confinement.

Con:

- Criticism of the military's capital sentencing scheme would be exacerbated by removing the most lenient of possible periods of confinement.

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

Other studies, articles, or information considered: AR 15-130, Army Clemency and Parole; Article 74, UCMJ.

Text of Proposed Change:

None.

13-1 Appeals

Concise Statement of Proposal:

Eliminate appeals unless the adjudged sentence includes death, a punitive discharge, or confinement for more than one year.

Rationale:

Proposal would require an amendment of Article 69, UCMJ. Congress is not going to eliminate the automatic review of certain GCMs, found in section (a), or the discretionary appeal found in section (b).

To eliminate the right of appeal, even in misdemeanor cases, when there has been a fraud perpetrated on the court, or newly discovered evidence that exonerates an accused is found, will not pass constitutional muster.

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.

13-2 Affirmative Appeal Request

Concise Statement of Proposal: Convicted soldiers must affirmatively request an appeal.

Rationale:

1. It now takes an intentional act by the soldier [a waiver or withdrawal from appellate review (RCM 1201(a)(2)(B))] for the Army Court of Criminal Appeals not to review a case in which the approved sentence extends to a punitive discharge or confinement for one year or longer.

2. On the other hand, a soldier whose sentence warrants automatic review by ACCA must affirmatively request appellate representation. RCM 1202(b)(2)(A).

3. With limited exceptions, mostly notably death penalty cases, every jurisdiction in the U.S. requires a convicted person to take some initiative or affirmative act to appeal his or her conviction.

4. Statistics show more soldiers withdrawing their cases from ACCA review than at any time since 1984.

5. Requiring soldiers to take some conscious, affirmative action to effectuate an appeal does not undermine the fundamental right to appellate review.

Impact on other proposals:

Unknown

Other studies considered:

Mandatory Appeal As of Right Upon Petition: Implementation Proposal

Issue:

The Uniform Code of Military Justice (UCMJ), Article 66(b), provides that the Judge Advocate General shall refer the records of courts-martial that resulted in approved sentences which include, among other punishments, a dishonorable or bad-conduct discharge, or confinement for more than one year, to a Court of Criminal Appeals. This is so even if the convicted service member does not request that his or her court-martial be appealed. This practice, the appealing of convictions and sentences without an informed request or participation of the person convicted, is out of step with Federal and State practice, and should be abolished at least as to special courts-martial.

Proposal:

Amend the UCMJ and the Manual for Courts-Martial, Part II, Rules for Courts-Martial, to provide for mandatory review of special courts-martial by a Court of Criminal Appeals only upon the timely submission of a request for appeal by a convicted service member in a court-martial whose findings and sentence have been approved by the convening authority.

Implementation:

That the UCMJ, Article 60, be amended as follows:

(f) Upon taking action in a special court-martial the convening authority shall immediately notify the service member of his action in the case. In addition, the convening authority shall cause the service member to be provided a detailed statement of appellate rights and entitlement to appellate representation as provided by this title. Such information shall include notification of the 90 day appeal period as set forth in section 66(c) of this title (article 66(c)).

That the UCMJ, Article 65(a), be amended as follows:

(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or in which the time to request review of a special court-martial has not lapsed under section 866(b) of this title (article 66(b)), or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial, and action thereon

shall be transmitted to the Judge Advocate General for appropriate action.

That the UCMJ, Article 66(b), be amended as follows:

(b) The Judge Advocate General shall, in cases of:

(1) *general courts-martial* refer to a Court of Criminal Appeals the record of the court-martial-

(A) if the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more; and

(B) except in the case of a sentence extending to death, if the right of appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61), or,

(2) *special courts-martial*, upon personal written request of a convicted service member submitted after approval of the findings and sentence by the convening authority, refer to a Court of Criminal Appeals the record of the court-martial-

(A) if the sentence, as approved, extends to a bad conduct discharge, or confinement for one year; and

(B) if the right of appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(C) *Time Limits:*

(i) Requests for referral of the record of a court-martial to a Court of Criminal Appeal may not be submitted until the findings and sentence have been acted upon by the convening authority.

(ii) Requests for referral of the record of a court-martial to a Court of Criminal Appeal will not be accepted more than 90 days after the findings and sentence have been acted upon by the convening authority except for good cause shown.

(iv) If more than 90 days elapse from the day that the convening authority acts on the findings and the sentence and no request is submitted by an accused to refer the record of the court-martial to a Court of Criminal Appeal, the case shall be reviewed under article 869 of this title (article 69).

That the UCMJ, Article 69, be amended as follows:

(b) The record of trial in each special court-martial that is not reviewed under section 866(b) of this title (article 66(b)) because more than 90 days has elapsed from the day that the convening authority acted upon the findings and sentence and the service member did not request review by a Court of Criminal Appeal, shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused has also not waived or

withdrawn his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if a reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both

(c) The findings or sentence, or both, in a court-martial case not reviewed . . .

Justification:

The majority of service members who are convicted by special courts-martial do not meaningfully exercise their rights of appeal. This is so because current military trial practice provides that service members convicted by special courts-martial must execute a special power of attorney in favor of an unknown and unassigned military appellate defense counsel as a condition for approval of appellate leave. Once on appellate leave however, most convicted service members do not contact their appellate attorney. Then, and as a direct consequence of the special power of attorney, military appellate defense counsel are required to affirmatively exercise the incommunicado service member's appellate rights even though the service member has not consulted with the appellate counsel and does not know that his or rights are being exercised. Moreover, and also as a result of the execution of the special power of attorney and the service member's failure to contact their assigned appellate counsel, the Courts of Criminal Appeals are required to hear cases brought before them where the service member has not elected to appeal the case and is not aware that the case is being appealed. This practice should be abolished. The amendments outlined above abolish this practice by requiring service members convicted by special courts-martial to affirmatively petition a Court of Criminal Appeal in writing within 90 days after the convening authority has acted in the case.

As for general courts-martial, the special power of attorney in favor of an unnamed and unassigned appellate defense counsel tends not to have the same effect. Service members convicted of general courts-martial tend to contact their appellate attorneys and exercise their appellate rights. Therefore the amendments outlined above do not extend to general courts-martial.

§ 870. Art. 70. Appellate counsel

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(1) of this title (article 27(b)(1)).

(b) Appellate Government counsel shall represent the United States before the Court of Criminal Appeals or the Court of Appeals for the Armed Forces when directed to do so by the Judge Advocate General. Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.

(c) Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court—

(1) when requested by the accused in any General Courts-Martial or in any Special Courts-Martial ~~case~~ in which the convening authority has approved ~~court has entered a~~ finding of guilty on a contested charge;

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has sent the case to the Court of Appeals for the Armed Forces.

(d) The accused has the right to be represented before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court by civilian counsel if provided by him.

(e) Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as the Judge Advocate General directs.

NOTE:

Would probably also have to modify RCM 1202(b)(2) and 1204(b)(1)

13-3 Guilty Plea Appeals

Concise Statement of Proposal: Eliminate appeals in all guilty pleas cases.

Rationale: Neither the Congress, the public, nor the U.S. Court of Appeals for the Armed Forces would tolerate, let alone support, the proposal.

Impact on other proposals for change:

Other studies, articles, or information considered:

14-1 Terminology Changes

Concise Statement of Proposal: Terminology changes throughout the system to bring language more in line with civilian sector. (arrest v. apprehension, charged v. preferred.)

Rationale: The terminology used in the MJ system involves both military custom and precision usage. For example, in a military context “arrest” historically refers to a state of moral restraint placed upon an officer as in “arrest in quarters.” Whether someone is under arrest (civilian) or under apprehension (military) the legal significance of the status is not different only the terminology. Military case law and precedent has interpreted the rules and procedure under which we practice, and as a result of this interpretation the language of military justice has evolved. Changing the words to sound more like civilian practice would not change the underlying concepts or practice, it would only make military practitioners sound more like civilians, albeit confused ones.

It may make parts of the system easier for civilians to understand, but all the other differences will still require education.

Impact on other proposals for change:

Other studies, articles, or information considered:

14-2 Trial Counsel (TC) Manual

Concise Statement of Proposal: Create a TC manual like US Attorneys' Manual to standardize prosecutions

Rationale: The information covered in this manual (index attached to this report) is already covered in several TJAGCLS publications, DA Pams and Army Regulations.

Impact on other proposals for change: None

Other studies, articles, or information considered: None

15-1 Convening authorities

Concise Statement of Proposal: Examine convening authorities – number, level of court.

Rationale: This proposal is currently under consideration by OTJAG, Criminal Law Division as a part of its review of the consolidation of GCM authorities as part of the overall Army Transformation.

Impact on other proposals for change: As a corollary, a separate proposal should examine/study the removal of references to the term “GCMCA” as a decision authority in other non-UCMJ related regulations (e.g., ARs 600-37, 600-8-24, 635-200). Such term and similar terms should be replaced with an appropriate designation such as “commander in the grade of BG or above.”

Other studies, articles, or information considered: None

16 Victim-Witness Program

Statement of Proposal: Examine all aspects of the Army Victim Witness Assistance Program

Rationale: Remove from MJR Committee Charter, as recent Congressional interest in this topic as part of the sexual abuse task force effectively removes our ability to recommend or influence changes

Impact on other proposals for change: None.

Other studies, articles, or information considered: None.

17-1 Army Indiscipline Trends

Statement of Proposal: Support committee members with analysis from ACMIS or other databases.

Rationale: This was not a proposal for change, merely a tasker to back up other committee members with data to support their analysis. Attached data provided; other will be provided upon request.

Impact on other proposals for change: None.

Other studies, articles, or information considered:

18-2 JA Organization for Delivery of MJ Services – Regional Justice Centers

Concise Statement of Proposal: Examine the feasibility of establishing Regional Justice Centers (aligned with the six Judicial Circuits) capable of providing trained and experienced Trial Counsel to prosecute General Courts-Martial on behalf of local commands. These Centers would be resourced with personnel transferred from the supported commands.

Rationale:

- ✓ The potential benefits of this proposal include:
 - Improved administration of military justice resulting from better tried cases with fewer errors/appellate issues and shorter records of trial
 - Improved retention by creating attractive trial advocacy positions for Judge Advocates
 - Improved processing of courts-martial by freeing Chiefs of Criminal Law to focus on correct pretrial and post-trial processing of cases

- ✓ The disadvantages of the proposal outweigh the benefits:
 - Regionalizing military justice support to commanders runs counter to the trend of embedding legal personnel in units – senior commanders will view this as a reduction in the responsiveness of legal support to their units
 - Local trial counsel may resent “outside” counsel coming in to prosecute the serious cases
 - Regional Justice Centers will be TDA organizations susceptible to recurring personnel cuts to support the operational force
 - Regional Trial Centers will draw experienced Judge Advocates away from key assignments in the Units of Action and Units of Employment

- ✓ TCAP already serves the critical function of assisting SJA Offices with limited military justice experience/expertise to prosecute high profile cases

Impact on other proposals for change: N/A.

Other studies, articles, or information considered: Corps Functional Review

18-3 JA Organization for Delivery of MJ Services – Deployment Teams

Concise Statement of Proposal: Examine the feasibility of establishing Judge Advocate Deployment Teams (JADTs).

Rationale:

- ✓ The concept of Judge Advocate Deployment Teams involves establishing trained, flexible, rapidly deployable legal teams capable of short-notice deployments in support of Army operations worldwide.
- ✓ TAJAG directed that this concept be studied by the Legal Center & School as part of a follow-up to the initial development of this proposal in the 2003 Corps Functional Review (CFR).
- ✓ The Legal Center and School is looking at the potential for resourcing these teams from RC JAGC personnel.
- ✓ The Military Justice Committee should not duplicate this work. The results of the Legal Center and School's assessment can be shared with this committee once it is completed by the end of the 2d quarter, FY04.

Impact on other proposals for change: N/A

Other studies, articles, or information considered: Corps Functional Review.

18-4 JA Organization for Delivery of MJ Services - Courtrooms

Concise Statement of Proposal: Develop a strategy to upgrade courtroom facilities and field new technology in military courtrooms.

Rationale:

- ✓ Many Army courtroom facilities are substandard. The JAGC has traditionally lacked a coherent approach to ensuring courtroom construction or rehab/upgrade projects compete effectively for funding.
- ✓ Options include:
 - Local Garrison can approve rehabilitation/renovation of existing facilities using up to \$750K (OMA)
 - ACSIM can approve rehabilitation/renovation projects up to \$1.5M (minor construction limit)
 - Major Construction Army (MCA) projects must compete for funding with other high priority installation projects
- ✓ Chief, Criminal law Division (OTJAG), is working with ACSIM staff to:
 - Develop designs for “Standard Courtroom – Small Installation” and “Standard Judicial Center/Courtroom – Large Installation.” This will reduce costs for such projects and help establish a baseline standard against which existing facilities will be measured.
 - Secure support for ACSIM funding of courtroom renovation projects on CONUS installations
- ✓ Simultaneously, courtrooms must be equipped with new technology to enhance their presentation and recording capabilities
- ✓ Further study of this issue is warranted as a prelude to developing a viable strategy to improve Army courtroom facilities

Impact on other proposals for change: Improved courtroom facilities will generate a more professional environment at courts-martial.

Other studies, articles, or information considered: None

18-5 Court Reporters

Concise Statement of Proposal: Examine court reporter billets in the active and USAR force structure. MTOE spaces in transformed Army must support SPCMCA and GCMCA. In the TDA Army, where should spaces be located? How many can be civilian reporters and how many should be military rotation and training base positions? Where should USAR spaces be located? Can we achieve economies of scale and better train reporters by including them on USAR military judge teams? Should reporters be supervised by SJAs or by judges? How should positions be graded? Are court reporting “centers” feasible/desireable?

Rationale: Until we resolve who the CAs will be in the transformed Army, it’s difficult to determine where court reporters should be located (MTOE issue). In the garrison Army, consolidation of court reporter assets may be feasible, but complete civilianization is not, as it will impact on force structure and training base issues. Court reporter positions in the USAR have not been closely examined. Many are filled by soldiers without the ASI, and in organizations that are unlikely to convene courts-martial. Configuring the USAR court reporter force structure to remove some positions from LSOs and units unlikely to convene, even under full mobilization, sufficient courts-martial to justify the positions, and transferring those positions to fill out USAR military judge teams in the 150th LSO may be more optimal use of these assets. Recommend further study of this issue in the judicial FDU this summer and with the subcommittee looking at force structure in the transformed Army.

Impact on other proposals for change: Where and by whom courts-martial are convened drives the issue of court reporting assets. This issue must be systemically addressed along with other force structure issues.

Other studies, articles, or information considered: Harvey study on transformation of military justice; interviews with court reporters, military judges, and other military justice professionals, active and reserve.

18-6 JA Organization for Delivery of MJ Services – Criminal Law Personnel Tracking

Concise Statement of Proposal: Examine the feasibility of establishing a criminal law/litigation track in JAGC personnel management. This initiative could be modeled on the current Acquisition Law Specialty (ALS) Program.

Rationale:

- ✓ Establishing a criminal law/litigation track offers a number of advantages:
 - It will encourage the creation of a cadre of experienced litigators in the JAGC
 - It will enable officers to specialize in a core competency of the JAGC without adversely impacting their potential for advancement and promotion
 - It may encourage officers interested in criminal law/litigation to remain on active duty

- ✓ There are, however, many disadvantages to the proposal, to include:
 - It will diminish the opportunities for many officers not in the program to serve in criminal law/litigation positions
 - It will have an uncertain impact on retention – officers in the program may leave the JAGC after developing a marketable expertise
 - It fails to recognize that Brigade Trial Counsel are increasingly involved in operational law matters; prosecuting courts-martial is no longer their pre-eminent duty
 - Experience with the ALS Program indicates that such initiatives are not always successful in retaining and promoting officers with the desired specialty

- ✓ The JAGC remains committed to the concept of a professionally well-rounded officer, capable of functioning effectively in a variety of duty positions
 - Promoting specialization in military justice/litigation will detract from this goal

Impact on other proposals for change: N/A

Other studies, articles, or information considered:

18-7 JA Organization for Delivery of MJ Services:

Concise Statement of Proposal: Examine the feasibility of prescribing a requirement for assignment that Staff Judge Advocates and Military Judges have served as Trial Counsel and/or Defense Counsel

Rationale:

- ✓ Prior TC/DC experience ought to be a significant consideration in the selection of Staff Judge Advocates and especially Military Judges
- ✓ The quality, depth, and recency of this TC/DC experience are critical factors
 - How many cases did the officer try?
 - On how many of these cases was the officer the lead counsel?
 - How many of these cases were contested?
 - How many were tried before a panel?
 - When was the last time the officer appeared before a court-martial?
- ✓ There are other criteria, however, that are as important as prior TC/DC experience, such as: judgment; temperament; leadership; intelligence, etc.
- ✓ JAGC is small branch whose assignment process is precise enough to ensure qualified personnel are placed in SJA/MJ billets
 - Existing procedures in JAGC Personnel Policies (JAG Pub 1-1), Section VII, on the selection, certification, and assignment of judges are sufficient
 - A rule prescribing specific TC/DC experience for SJAs could preclude otherwise qualified personnel from serving successfully as a SJA
 - Some SJA positions have a small MJ workload and prior experience in contracting or environmental law may be a more useful predictor of success in the position

Impact on other proposals for change: N/A

Other studies, articles, or information considered: JAG Pub 1-1, Section VII